Petition

81-2065

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NO.

In the
SUPREME COURT OF THE UNITED STATES

GERRIT J. VAN DISSEL, ET AL,
Petitioners
v.
JERSEY CENTRAL POWER & LIGHT
COMPANY, a corporation
of New Jersey,
Respondent

Petition for a Writ of Certiorari
to the Superior Court of New Jersey,
Appellate Division

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Question Presented

Are common law tort claims brought in state court by local property owners against the owner and operator of a nuclear power plant for damage to their property due to the plant's thermal pollution of local coastal waters federally preempted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011 *et seq.*?

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MISCELLANEOUS

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Petitioners[1/] respectfully pray that a writ of certiorari issue to review the decision of the Superior Court of New Jersey, Appellate Division, entered on November 5, 1981, affirming the trial court's dismissal of the first seven counts of Petitioners' Complaint, i.e., their "tort" claims, on the ground that the prosecution of such claims is federally preempted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011 et seq.

1/ This Petition is filed on behalf of Gerrit J. Van Dissel and the following additional plaintiffs who served as subclass representatives below and who, like Van Dissel, own waterfront property in the Oyster Creek-Forked River area: Clifford A. Hewitt, Paul G. Mainieri, Frank E. Arkenberg, Bayside Beach Club, Inc., James W. Karlinski, Dorothy A. Bartholemew, and John P. Fraser.

Opinions Below

The opinion of the Superior Court of New Jersey, Appellate Division, dated November 5, 1981 (A.1)* is reported at 181 N.J. Super. 516, 438 A.2d 563 (App. Div. 1981). The opinion of the Superior Court of New Jersey dated July 22, 1977 (A.27) is reported at 152 N.J. Super. 391, 377 A.2d 1244 (1977).

Jurisdiction

This action was brought in the Superior Court-Law Division, Morris County, New Jersey on November 19, 1975. A.55. On September 19, 1977, the first seven counts of the Complaint, i.e., the tort claims, were dismissed. A.50. After a trial on the inverse condemnation claim, the trial judge dismissed the Complaint in toto on December 18, 1979. A.53.

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* All "A" references are to the Appendix to this Petition filed herewith.

Petitioners appealed to the Appellate Division of the Superior Court; and that court affirmed the decision below on November 5, 1981. A.1. The decision of the Appellate Division became final after the Supreme Court of New Jersey denied Petitioners' Petition for Certification on February 10, 1982, A.93, and dismissed Petitioners' Appeal on February 17, 1982, A.94, and again on March 16, 1982. A.95. This Petition is being filed within 90 days of the New Jersey Supreme Court's denial of the Petition for Certification and of its dismissals of the Appeal. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3). See Murray v. Gerrick & Co., 291 U.S. 315, 316 (1934).

Constitutional and Statutory Provisions Involved

United States Constitution, Article VI, cl. 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof;...shall be the supreme Law of the Land;..."

42 U.S.C. §2021(c)(1):

"...the Commission shall retain authority and responsibility with respect to regulation of -- (1) the construction and operation of any production or utilization facility;..."

42 U.S.C. §2021(k):

"Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards."

Statement of the Case

On November 19, 1975, Petitioner Van Dissel filed an eight-count Complaint in the Superior Court of New Jersey Law

Division - Morris County against the Respondent Jersey Central Power & Light Company (hereinafter "JCP&L"). A.55. In his Complaint Van Dissel alleged that he was the owner of waterfront property in Forked River, New Jersey, and that JCP&L, by discharging heated water into Oyster Creek and by conducting certain other activities, had proximately caused the proliferation of shipworms in Forked River, Oyster Creek, Barnegat Bay and various adjacent lagoons, canals and inlets and had thereby damaged his waterfront property.[2/] The various counts of the Complaint set forth eight theories of liability as follows: First Count -

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2/ A "shipworm" is a clam-like animal whose body resembles a worm and whose head contains its shell. The shipworm uses its shell like a bevel to bore into, and ultimately to destroy, wood waterfront structures and wood boats.

negligence, Second Count - nuisance, Third Count - trespass, Fourth Count - strict liability, Fifth Count - violation of New Jersey Water Pollution Control statutes, N.J.S.A. 23:5-28 and N.J.S.A. 58:10-23.1 et seq., Sixth Count - violation of the Refuse Act of 1899, 33 U.S.C. §407, Seventh Count - violation of the Federal Water Pollution Prevention & Control Act, 33 U.S.C. §1251 et seq. and Eighth Count - inverse condemnation. Moreover, Van Dissel brought this Complaint on his own behalf and as a class action on behalf of "all riparian property owners with property located on Forked River, Oyster Creek, Barnegat Bay and various lagoons, canals and inlets which are tributary thereto whose property has been damaged as a result of the ecological and environmental changes in said bodies of water as a result of the

operation by defendant of the Oyster Creek Nuclear Generating Station." Finally, Van Dissel demanded "trial by jury of twelve on all issues raised in the foregoing Complaint."

In the course of an evidentiary hearing to determine the appropriateness of permitting this case to proceed as a class action, JCP&L filed a Motion to Dismiss Complaint on September 1, 1976, A.65, with supporting affidavits of Donald Ross, A.67, and Donald R. Rees, A.70. In this Motion and in various briefs submitted in connection with the Motion, JCP&L contended that the trial court had no subject matter jurisdiction over the case because federal laws had preempted the field. On September 15, 1976, Van Dissel filed an Affidavit in Opposition to the Motion, i.e., the Affidavit of Michael Warren Golay. A.82. Moreover, Van Dissel submitted

memoranda in opposition to JCP&L's Motion in which he argued that Congress had not intended to preeempt state common law tort claims and a constitutional claim such as inverse condemnation.

On July 25, 1977, Superior Court Judge Arnold M. Stein filed an Opinion in which he granted JCP&L's Motion with respect to Counts One through Seven of the Complaint and denied the Motion with respect to Count Eight of the Complaint. A.27. Specifically, Judge Stein ruled that Congress, in the Atomic Energy Act, intended to preempt state control of activities in matters relating to protection against radiation hazards, that Van Dissel's tort claims and claims of statutory violations "constituted at least an indirect interference with the defendant's radwaste discharge system"

and that, therefore, the court lacked subject matter juisdiction over these claims. A.47-49. With respect to Count Eight of the Complaint, Judge Stein ruled that Van Dissel had stated a claim against JCP&L for damages on the theory of inverse condemnation. These rulings were embodied in an Order dated September 16, 1977 and filed on September 19, 1977. A.50.

On November 7, 1977, Judge Stein filed an Order in which he determined that the action was maintainable as a class action with nine subclasses and and that each subclass would be defined by geographic areas delineated on an attached subclass map. He also permitted Van Dissel to amend his Complaint for the purpose of adding additional plaintiffs and ordered that trial of liability and damages on the

inverse condemnation claim were to be bifurcated.

On March 8, 1978, venue in this action was transferred to the Superior Court, Law Division, Ocean County. On December 29, 1978, Plaintiffs' Second Amended Complaint was filed. In it, the eight subclass representatives, who were to represent subclasses one through eight at the trial, were joined as party plaintiffs.[3/]

Meanwhile, on December 4, 1978, JCP&L had filed a motion by which it sought a determination that the liability issue, i.e., "whether there has been a taking," be decided by a judge, rather than by a jury. In each of the Complaints

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3/ No representative of subclass 9 ever came forward to join this action; and the claims of persons living in the geographic area of subclass 9 were dismissed prior to the trial.

filed by Van Dissel and the other subclass representatives, a trial by a jury of twelve on all issues, including liability, had been demanded. After hearing, on January 30, 1979, Superior Court Judge Harold Kaplan directed that all issues, other than the issue of just compensation, were to be determined by the court sitting without a jury.

Trial on the inverse condemnation claim commenced before Judge Kaplan on June 18, 1979, and proceeded from day to day up to and including June 28, 1979. By Letter Opinion dated November 21, 1979 and filed on November 26, 1979, Judge Kaplan ruled in favor of JCP&L. On December 18, 1979 the trial court issued an order dismissing the Complaint. A.53.

On January 29, 1980, Petitioners filed a Notice of Appeal from the

dismissal of their claims to the Appellate Division of the Superior Court of New Jersey. In their brief on appeal, Petitioners argued, in part, that "the trial court erred in dismissing counts one through seven of the Complaint since the Atomic Energy Act of 1954, as amended, did not preempt [their] common law tort claims against JCP&L." On November 5, 1981, the Appellate Division filed an opinion which affirmed inter alia the decision of Judge Stein dismissing Petitioners' tort claims. A.1.

On November 24, 1981, Petitioners filed a Notice of Petition for Certification in the Supreme Court of New Jersey. A.89. In their Petition, the Petitioners herein requested the Supreme Court to review the decision of the Appellate Division in toto including that part which affirmed the trial

court's dismissal of their tort claims on grounds of federal preemption. Petitioners also filed a Notice of Appeal to the Supreme Court of New Jersey on December 18, 1981. A.91. On February 10, 1982, the Supreme Court of New Jersey denied the Petition for Certification, A.93; and on February 17, 1982, it dismissed the Appeal. A.94. On March 16, 1982, the Supreme Court of New Jersey issued another order dismissing the Appeal. A.95.

Reasons For Granting The Writ

The Petitioners contend that the writ of certiorari should be granted because (I) the court below has decided an important federal question in a way which conflicts with the decisions of another state court of last resort and a federal court of appeals and (II) the court below has decided an important

question of federal law which has not been, but should be, settled by this Court and has decided such federal question in a way which conflicts with the applicable decisions of this Court. The important federal question at issue herein is whether Congress, in passing the Atomic Energy Act of 1954, as amended, intended to preclude citizens of the various states from asserting common law tort claims for damage done to their property by an atomic energy entrepreneur.

Argument

I. THE COURT BELOW HAS DECIDED THE FEDERAL QUESTION HEREIN IN A WAY IN CONFLICT WITH THE DECISIONS OF ANOTHER STATE COURT OF LAST RESORT AND A FEDERAL COURT OF APPEALS.

In deciding the case at bar, the Superior Court of New Jersey, Appellate Division, affirmed the trial judge's dismissal of the Petitioners' common law

tort claims on the basis that such claims constituted an impermissible interference with a federally preempted area of regulation. Subsequently, the Petitioners' Petition for Certification was denied and their appeal of the decision of the Appellate Division dismissed by the Supreme Court of New Jersey without opinion. Petitioners submit that the decision of the Appellate Division, the highest court of the State of New Jersey within the meaning of 28 U.S.C. §1257 under the circumstances of this case, conflicts with the decisions of at least one other state court of last resort and a federal court of appeals.

In Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W.2d 266 (1975), the Court of Appeals of

Michigan[4/] considered a private citizen's common law nuisance claim against the operator of a nuclear power plant for damages arising out of the operation of the plant's cooling pond. Id., at 241-43, 237 N.W.2d at 272. Specifically, the Court of Appeals relied upon two factors in upholding the viability of the plaintiff's nuisance claim against a challenge that such claim

4/ Under Michigan law, an appeal from a decision of the Court of Appeals to the Supreme Court may be taken "only in the discretion of the Supreme Court", Mich. Gen. Ct. R. 853.1. Counsel for the plaintiff in the Marshall case has informed counsel herein that he filed an Application for Leave to Appeal pursuant to Mich. Gen. Ct. R. 853.2 and that the application was denied by the Michigan Supreme Court. Pursuant to M.C.L.A. §600.319(1), "[t]he decisions on appeal of the court of appeals are final, except as reviewed by the supreme court as provided by supreme court rule." Therefore, Petitioners submit that the Marshall decision qualifies as a decision of "another state court of last resort" under Supreme Court Rule 17.

was federally preempted under the Atomic Energy Act of 1954, as amended, (the "Act"), 42 U.S.C. §2011 et seq.: 1) the power reserved to the States under §2021(k) of the Act "to regulate activities [of nuclear power plants] for purposes other than protection against radiation hazards," Marshall, supra, at 248-56, 237 N.W.2d at 275-79; and 2) the duty of the state courts to provide a forum, which is independent of the Atomic Energy Commission (now the Nuclear Regulatory Commission), wherein the state created rights and interests embodied in common law tort causes of action could be vindicated. Id., at 256-59, 237 N.W.2d at 279-80. Consequently, although affirming the trial court's dismissal of the plaintiff's damage claim on other grounds, the Michigan Court of

Appeals held that it was not federally preempted from considering a common law nuisance claim founded upon hazards caused by the nuclear power plant's cooling system. Id., at 247, 237 N.W.2d at 275.[5/]

5/ Similarly, in Greater Westchester Homeowners Association v. City of Los Angeles, 160 Cal. Rptr. 733, 735-39, 26 Cal. 3d 86, 93-100, 603 P.2d 1329, 1332-36 (1979), cert. den., 449 U.S. 820 (1980), the Supreme Court of California, recognizing a clear distinction between a state's exercise of its regulatory police power and a private citizen's prosecution in state court of a tort claim based upon the breach by a public utility of the obligations and duties imposed upon all persons by the common law, held that although the Federal Aviation Act, 49 U.S.C. §1301 et seq., established a comprehensive federal regulatory scheme, which preempted state regulation of airport noise levels, the state courts were not barred under federal preemption doctrines from hearing a a private homeowners association's common law action for nuisance brought against the proprietor of an airport for damages resulting from excessive airport noise levels.

In Silkwood v. The Kerr-McGee Corporation, 667 F.2d 908 (10th Cir. 1981), the Court of Appeals for the Tenth Circuit considered various claims, including one based in tort for damages resulting from the contamination of certain personal property by radioactive material, asserted against a nuclear fuel processor by the estate of a deceased employee. Id., at 914, 920. The defendant nuclear processor contended that its compliance with preemptive federal regulations precluded the application of Oklahoma's common law strict liability standard to it. Id., at 920. However, the Court of Appeals rejected this contention, finding that the imposition of such state created tort liability would

not interfere with federal regulation of the defendant's plant[6/] and that, in light of the absence of any power in the Nuclear Regulatory Commission to order compensation to victims of the nuclear energy industry, it was the intent of Congress that a compensatory remedy for such victims continue to be available under the tort law of the states. Id., at 920-21. Accordingly, the Court of Appeals affirmed the trial court's award of damages for tortious damage to the personal property of the plaintiff's decedent. Id., at 921.

6/ The Court of Appeals for the Ninth Circuit adopted a similarly narrow view of the scope of the federal preemption doctrine in the area of nuclear energy in Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission, 659 F.2d 903, 920-22 (9th Cir. 1981).

Petitioners submit that, whereas the decisions in Marshall and Silkwood support the prosecution of state common law tort claims arising out of the operation of the nuclear energy industry, the decision below holds that such claims are barred under the federal preemption doctrine. Thus, it is apparent that a serious conflict exists between the Marshall and Silkwood courts and the court below as to the disposition of the question of the application of the federal preemption doctrine to such claims. Therefore, this Court should grant certiorari herein to resolve this conflict over an important federal question, i.e., whether Congress, by the passage of the Atomic Energy Act, as amended, intended to preclude the states from providing a forum for

persons whose property has been damaged by participants in the nuclear energy industry.

II. THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT AND HAS DECIDED SUCH FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

As noted above, the Appellate Division, in considering the question of whether the Petitioners' common law tort claims were preempted by federal regulation of the nuclear energy industry, affirmed the trial court's dismissal of such claims. This Court has never decided this important question of federal law, i.e., whether Congress intended to invade such a traditional area of a state's concern and sovereignty as the provision of a forum to its citizenry to seek compensation for damage to

property. Moreover, the court below decided this important federal question in a manner inconsistent with the preemption decisions of this Court, the intent of Congress in enacting the Atomic Energy Act of 1954, as amended, (the "Act"), 42 U.S.C. §2011 et seq., and common sense.

The doctrine of federal law's preemption of specific state activities has its roots in the Supremacy Clause of the United States Constitution. U.S. Const., Art VI, cl. 2. This Court has stated that federal regulation of an area of commerce may preempt state action on the same subject if (1) there is an apparent congressional intent to blanket the field, (2) the federal and state schemes directly conflict, or (3) any state intervention would burden or frustrate the full

purposes and objectives of Congress. Florida Avocado Growers v. Paul, 373 U.S. 132, 141 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230-31 (1947); Greater Westchester Homeowners Association v. City of Los Angeles, 160 Cal. Rptr. 733, 735, 26 Cal. 3d 86, 93, 603 P.2d 1329, 1331-32 (1979), cert. den., 449 U.S. 820 (1980). See Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1146-47 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972); Marshall v. Consumers Power Co., 65 Mich. App. 237, 244-46, 237 N.W.2d 266, 273-74 (1975). Thus, the controlling inquiry on the preemption issue is determining whether the state action stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz,

312 U.S. 52, 67 (1941); Greater Westchester Homeowners Association v. City of Los Angeles, supra, at 735, 26 Cal.3d at 93, 603 P.2d at 1332. However, in this inquiry, "each case turns on the peculiarities and special features of the federal regulatory scheme in question," City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624, 638 (1973), and federal preemption should be recognized only to the extent necessary to serve the congressional objectives of that particular federal regulatory scheme. Merril Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117, 127 (1973). Indeed, under the preemption doctrine, courts should not seek out "conflicts between state and federal regulation where none clearly exists." Huron Portland Cement Co. v. Detroit, 362

U.S. 440, 446 (1960). Thus, where the effect of preemption is to impede the exercise of historic state powers this Court has held that the preemptive intent of Congress must be "clear and manifest." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Rice v. Santa Fe Elevator Corp., supra, at 230; Greater Westchester Homeowners Association v. City of Los Angeles, supra, at 735, 26 Cal.3d at 93-94, 603 P.2d at 1332. See Florida Avocado Growers v. Paul, supra, at 142 (no federal preemption "in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.")

Petitioners contend that the court below clearly misapplied the decisions of this Court in answering

the question of federal preemption before it: whether Congress exhibited a "clear and manifest" intent in the Act to immobilize private persons from pursuing state common law tort claims against nuclear licensees.

With regards to this question, Section 2021(b) of the Act established a procedure whereby the Atomic Energy Commission (now Nuclear Regulatory Commission) was empowered to enter into agreements with the various states for state regulation of some aspects of nuclear materials "for the protection of the public health and safety from radiation hazards." Section 2021(c) provided that certain aspects of regulatory jurisdiction over such materials were to remain with the Commission. In particular, under Section 2021(c)(1), "the

construction and operation of any production or utilization facility" was to remain within the exclusive regulatory jurisdiction of the Commission. However, clearly, Section 2021(c)(1) gave the Commission exclusive authority and responsibility over facility construction and operation only with respect to the radiological hazards. See 10 C.F.R. §8.4, Interpretation by the General Counsel: AEC jurisdiction over nuclear facilities and materials under the Atomic Energy Act. Section 8.4(j) provides that,

> under the pattern of the Atomic Energy Act, as amended by section 274, States which have not entered into a section 274 agreement with the AEC are without authority to license or regulate, from the standpoint of radiological health and safety, byproduct, source, and special nuclear material or production and utilization facilities. Even those States which have

> entered into a section 274 agreement with the AEC (Agreement States) lack authority to license or regulate, from the standpoint of radiological health and safety, the construction and operation of production and utilization facilities (including nuclear power plants) and other activities reserved to the AEC by section 274c. (Emphasis supplied.)

Indeed, the 1959 Amendment to the Act confirmed that the States were free to exercise regulatory jurisdiction over non-radiological hazards produced by the construction and operation of nuclear facilities. Section 2021(k), which was added in 1959, provided that "(n)othing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards." See also Legislative History of the

1959 Amendment contained at 1959 U.S. Code Cong. & Adm. News, at 2872, 2882-2883. There, the Joint Committee noted that,

> subsection (k) provides that nothing in the new section 274 shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protection against radiation hazards. This subsection is intended to make it clear that the bill does not impair the State authority to regulate activities of AEC licensees for the manifold health, safety, and economic purposes other than radiation protection.

On the basis of this statutory scheme and its legislative history, it has been held that the Act preempts state regulation of the operation of nuclear power plants in regards to matters dealing with radiation hazards. Northern States Power Co. v. Minnesota, supra, at 1147-1154. Indeed, the New Jersey Supreme Court adopted this view in State v. Jersey

Central Power & Light Co., 69 N.J. 102, 111-15, 351 A.2d 337, 342-44 (1976), holding that the State's regulatory efforts in seeking a civil penalty against JCP&L for a fish kill following a forced shutdown of the plant for the purpose of discharging radioactive wastes pursuant to its federal license requirements were barred by the preemptive effect of the Atomic Energy Act. However, while the Petitioners agree with the New Jersey Supreme Court that the Act ousts the state from any regulatory jurisdiction over radiological hazards, the Act in no way deprives a private citizen who has suffered personal or property damage resulting from non-radiological impacts from pursuing his state tort claims against a licensee. For

example, in Marshall v. Consumers Power Co., supra, at 247-54, 237 N.W.2d at 274-78, the Court of Appeals of Michigan expressly limiting the holding of Northern States Power Co. v. Minnesota to the preemption of state regulation of radiation hazards, held that the state courts were not barred under federal preemption doctrine from entertaining a private citizen's common law action for nuisance brought against the operators of a nuclear power plant for damages resulting from the non-radiological hazards created by the operation of the plant's cooling pond. Cf. Greater Westchester Homeowners Association v. City of Los Angeles, supra, at 735-39, 26 Cal.3d at 93-100, 603 P.2d at 1332-36 (1979). Also, in Silkwood v. The Kerr-

McGee Corporation, 667 F.2d 908, 920-21. (10th Cir. 1981), the Court of Appeals for the Tenth Circuit, in considering a tort claim for damages resulting from the contamination of certain personal property by radioactive material asserted against a nuclear fuel processor by the estate of a deceased employee, held that such claim was not preempted. Thus, a clear distinction exists between a state's exercise of its regulatory police power, which in regards to radiation hazards has been preempted by the Atomic Energy Act, and a private citizen's prosecution of a tort claim based upon the breach by the operator of a nuclear power plant of the obligations and duties imposed upon all persons by a state's common law.

In the case at bar, the Complaint included causes of action in negligence, nuisance, strict liability, and trespass for damages arising from the thermal and other environmental effects attributed to the construction and operation of the nuclear plant. Clearly, then, this case presents no issue concerning the application of the State's regulatory power, but rather only an issue of the Petitioners' right to pursue their common law tort remedies in state court for injuries sustained from non-radiological hazards. Furthermore, the Petitioners' pursuit of these remedies would not have even the indirect effect upon preempted areas which the trial court gleaned from the fact that the plant's radwaste discharge system is "piggybacked" onto the once-through cooling system.

A. 40-41. Simply, the only relation of the radwaste discharge system to the once-through cooling system is that the former utilizes a portion of the cooling system discharge canal and that liquid radwaste is diluted by coolant water. A. 84. To put it another way, the liquid radwaste is poured through a pipe into Oyster Creek, the canal into which water used to cool the condenser and water used to dilute the heated coolant water is pumped. In addition, only the cooling of the condenser increases the temperature of the water in a consequential way. A. 85. In light of these undisputed facts, there is absolutely no reason to believe that, were the Petitioners to recover money damages on their tort claims for past

injuries due to the thermal pollution of the plant, JCP&L would be prevented in any way from carrying out its federally mandated obligations concerning the disposal of radwaste. Cf. State vs. Jersey Central Power & Light Co., supra, at 115, 351 A.2d at 344. Clearly, the subject matter of the Petitioners' common law tort claims relates solely to the compensation for injuries resulting from the plant's non-radiological hazards caused by thermal pollution and environmental change and has no bearing upon the future operation

of the plant's radwaste discharge system.[7/]

Moreover, the legislative history of the "Price-Anderson Amendment" to the Act, which shows a congressional intent to strengthen and foster state tort claims concerning the radiological hazards of a nuclear power plant, is totally contradictory to the purported intent on the part of Congress to preempt state tort claims for non-radiological effects of a nuclear

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7/ In Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission, 659 F.2d 903, 920-922 (9th Cir. 1981), the Court of Appeals for the Ninth Circuit, considering the issue of federal preemption in the context of state regulatory efforts against the nuclear power industry, adopted a very narrow view of the scope of federal preemption and would reject the notion that the the "indirect interference" found by the trial court to be inherent in the prosecution of this case would violate federal law.

plant, like those at issue in the case at bar. In particular, Section 2210 of the Act, added in 1957 and amended several times thereafter, provides for financial (insurance) protection of licensees for "public liability claims." Public liability is defined as "any legal liability arising out of or resulting from a nuclear incident." 42 U.S.C. §2014(w). Moreover, the term "nuclear incident" is defined as:

> any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss or damage to property, or loss of use of property arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. 42 U.S.C. §2014(q).

In the Joint Committee Report which accompanied the original 1957 amendment

adding Section 2210 to the Act (the "Price-Anderson Amendment"), the following appears:

> The basic principles underlying the bill are two:
>
> 1. Since the rights of third parties who are injured are established by State law, there is a likelihood that the damages exceed the amount of financial responsibility required together with the amount of the indemnity. At that point the Federal interference is limited to the prohibition of making payments through the State courts and to prorating the proceeds available. . . 1957 U.S. Code Cong. & Adm. News at 1810. (Emphasis supplied).
>
> Section 1 adds to the Atomic Energy Act of 1954 a new finding that it is in the interest of the general welfare and common defense that the United States can undertake both the indemnity and limitation of liability programs established by this bill. The primary concern of the Federal Government is with the protection to the people who might suffer damages from the new atomic energy industry. 1957 U.S. Code Cong. & Adm. News at 1816. (Emphasis supplied).

Again, in regards to the 1966 amendment to Section 2210, which provided for emergency assistance payments to tort claimants and for waiver of defenses by licensees under certain circumstances, the Joint Committee stated the following:

> Since its enactment by Congress in 1957 one of the cardinal attributes of the Price-Anderson Act has been its minimal interference with State law. Under the Price-Anderson system, the claimant's right to recover from the fund established by the act is left to the tort law of the various States; the only interference with State law is a potential one, in that the limitation of liability feature of the act would come into play in the exceedingly remote contingency of a nuclear incident giving rise to damages in excess of the amount of financial responsibility required together with the amount of the governmental indemnity. 1966 U.S. Code Cong. & Adm. News, at 3206. (Emphasis supplied).

If these uncertainties are to be removed and these deficiencies corrected, and if greater uniformity in the treatment of claimants is to be assured -- as the committee is convinced that they should be -- then it appears to the committee that Federal legislative action is required. However, the committee does not believe it is necessary to go to the length of enacting substantive law -- that is, a new body of Federal tort law -- to achieve these ends. Essentially the same result, it is believed, can be accomplished through a Federal statute authorizing the Atomic Energy Commission to require that participants in the nuclear industry waive certain key defenses to liability that might otherwise be permissible under applicable State or Federal law. . .

This approach to the problems discussed above is in keeping with the approach followed in enacting the original Price-Anderson Act -- namely, interfering with State law to the minimum extent necessary. In essence, the plan adopted permits the retention of State law with respect to the cause of action and the measure of damages, but the requirements specified for the insurance contracts and indemnity agreements provide the

> uniform rules needed to accomplish the bill's objectives. 1966 U.S. Code Cong. & Adm. News at 3209 (Emphasis supplied).

Clearly, the legislative history of Section 2210, set forth above, demonstrates that Congress intended to enhance, rather than to preempt, state tort claims based upon injury from radiological hazards. Petitioners submit that this clear expression of congressional intent to enhance the remedies available to private persons in pursuit of their state tort claims arising out of the radiological hazards of a nuclear power plant is totally inconsistent with a congressional intent to deprive private parties of their state common law tort claims against a nuclear entrepreneur arising out of the non-radiological effects of the operation of a nuclear power

plant. This inconsistency is especially glaring in light of the fact that Congress has not seen fit to provide an alternative federal forum for prosecution of such non-radiological tort claims. Cf. San Diego Building Council v. Garmon, 359 U.S. 236 (1959). Clearly, in reaching its decision, the court below misconstrued the most pertinent available expressions of congressional intent regarding tort claims like those asserted by the Petitioners, and, as a result, erroneously applied the teachings of this Court on the doctrine of federal preemption.

In the final analysis, the error of the decision below is perhaps best exemplified by the confusion that it imparts to the question of the Act's

relationship to state created tort claims in the absence of a definitive statement on that question by this Court. In short, the decision below means, in effect, that Congress has mandated in the Act a federal regulatory scheme which, on the one hand, preempts state regulation of radiological hazards while enhancing and encouraging state common law tort claims relating to radiological hazards, but, on the other hand, does not preempt state regulation of non-radiological hazards, while foreclosing state common law tort claims relating to non-radiological hazards. Simply stated, under any reading of Sections 2021 and 2210 of the Act and their legislative histories, such a bifurcated treatment of state common law tort claims relating to radiological and non-radiological hazards

is patently erroneous and irrational. Indeed, the folly of this bifurcated treatment is illustrated by the conflicting positions adopted by the Silkwood court, which supported a claim for damages arising out of a radiological hazard, and the court below, which denied a claim for damages arising out of the non-radiological hazard of thermal pollution. Petitioners submit that this Court should remove this source of confusion by addressing the important question of federal preemption of a traditional area of state concern presented by the decision below, not only to secure a needed compensatory remedy for the Petitioners and other future victims of the non-radiological hazards of the

nuclear power industry, see Silkwood, supra, at 920, but also to establish with finality and consistency a definitive rule for the assertion of state law tort claims against a nuclear power industry which is increasingly controversial and strategically important to the energy future of our nation. Consequently, this Court should grant certiorari herein to review the important federal question presented in the decision below.

Conclusion

For the reasons stated herein, this Court should grant the Petitioners' Petition for Writ of Certiorari and review the important question of Congress' intent vel non to preclude the assertion of state tort claims by persons whose

property is damaged by the non-radiological hazards of the nuclear energy industry.

Respectfully submitted,

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Appendix

81-2065

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NO.

In the
SUPREME COURT OF THE UNITED STATES

GERRIT J. VAN DISSEL, ET AL,
Petitioners

v.

JERSEY CENTRAL POWER & LIGHT
COMPANY, a corporation
of New Jersey,
Respondent

Appendix to Petition for a Writ of Certiorari

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1871-79

Filed November 5, 1981

GERRIT J. VAN DISSEL, et al

Plaintiffs-Appellants,

v.

JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey,

Defendant-Respondent.

Argued October 5, 1981 - Decided November 5, 1981

Before Judges Bischoff, King and Polow.

On appeal from the Superior Court of New Jersey Law Division, Ocean County, whose opinion is reported at 152 N.J. Super 391 (Law Div. 1977).

The opinion of the court was delivered by

BISCHOFF, P.J.A.D.

This law suit, instituted as a class action, was brought on behalf of all

riparian property owners who claimed to have an interest in property located on Forked River, Oyster Creek, Barnegat Bay and various lagoons, canals and inlets which are tributaries of those waterways. The defendant is Jersey Central Power & Light Co. (JCP&L), a public utility of the State of New Jersey which constructed a nuclear power reactor plant near plaintiffs' properties. Plaintiffs contend that certain processes employed at the plant have caused damage to their properties by the creation of a warm water environment allowing for the proliferation of shipworms which have, in turn, destroyed wooden docks, appurtenances and other structures which extend into the waterways.

The complaint was filed on November 19, 1975, seeking money damages and a restraint against further operation of the

plant in such a manner as to cause damage to plaintiffs and other members of subclasses. Eight theories of liability were set forth in the complaint:

1. Negligence.
2. Nuisance.
3. Trespass.
4. Strict Liability.
5. Violation of N.J. Water Pollution Control Statutes (N.J.S.A. 23:5-28, N.J.S.A. 58:10-23.1).
6. Violation of Refuse Act of 1899, 33 U.S.C. 407.
7. Violation of the Federal Water Pollution Prevention & Control Act, 33 U.S.C. 1251 et seq. and,
8. The unlawful taking of private property without just compensation or inverse condemnation.

A demand for jury trial of all issues was made. Defendant made a motion to dismiss the complaint for lack of jurisdiction over the subject matter, contending federal law had preempted the field. The trial judge, in an opinion reported at 152 N.J. Super. 391 (Law Div. 1977), relying in part upon State v. Jersey Central Power and Light Co., 69 N.J. 102 (1976), ruled

that "Plaintiffs' attempts to seek money damages through the vehicle of tort claims constitutes at least an indirect interference with defendant's Radwaste Discharge System. Such state interference is impermissible. This court lacks subject matter jurisdiction over all of plaintiffs' claims based upon tort liability and statutory violations." 152 N.J. Super. at 403. He entered an order dismissing the first seven counts of the complaint. Defendant's motion was denied with respect to plaintiffs' inverse condemnation claim. Additional pretrial motions resulted in the entry of relevant orders:

1. Dividing plaintiffs into nine subclasses related to geographic areas delineated on a subclass map;

2. Bifuracting the action as to liability and damages, and

3. Directing that the issues of liability on the inverse condemnation claim be tried before a judge without a jury.

At the conclusion of the nine-day trial on liability the judge ruled, in essence, that as to subclass one the defendant had caused the shipworm invasion in the area of the subclass, but that plaintiffs had not carried the burden of proving that the claimed damage had been caused by shipworm infestation. As to the other subclasses the judge ruled plaintiffs had failed to demonstrate that defendant's nuclear generating station had proximately caused the complained of damage. The complaint was dismissed. On this appeal the plaintiffs challenge three rulings of the trial court. They contend it was error for the trial court to

I. Rule that federal law had preempted the field.

II. Deny them a jury trial on the liability phase of the claim for damages based on inverse condemnation.

III. Hold that plaintiffs had failed to demonstrate that their damages were proximately caused by defendant's operation of the Oyster Creek nuclear generating station (OCNGS).

I

FEDERAL PREEMPTION

The history of the licensing, construction and operation of defendant's plant is reviewed in detail in the opinion of the Supreme Court in State v. Jersey Central Power & Light Co., 69 N.J. 102, 105-106 (1976).

The defendant commenced operation of the nuclear generating station in December 1969. Plaintiffs allege that

certain procedures established for its continued operation have resulted in a significantly altered marine environment in the south branch of the Forked River - Oyster Creek waters in the area in which plaintiffs' properties are located. They contend the operation of the plant, in particular the cooling system, has resulted in higher salinity levels, increased water flow and increased water temperatures. These changes they allege have permitted the proliferation of shipworms which have attacked and destroyed wooden docks, bulkheads and appurtenances belonging to plaintiffs.

Starting in 1966 Oyster Creek and Forked River were extensively altered in preparation for the nuclear generating station. Both were deepened, straightened and widened to allow for the contruction of intake and discharge canals to service the generating station.

Salinity levels in portions of the creek which had been brackish to fresh-water were changed to higher salinities more characteristic of the bay.

The South Branch of the Forked River serves as the intake canal and the flow of water is toward the generating station whenever the station is in operation and is no longer dependent upon the tidal flow.

Plaintiffs argue that the cooling system used by the generating station caused or contributed to the shipworm infestation by increasing water flow and releasing a fan shaped area of warm water at the discharge canal outlet called a thermal plume. The evidence presented to the trial court of the effect of marine environment upon the proliferation of the various species of shipworms is extensively reviewed

in the opinion of the trial court in 152 N.J. Super. at 396 to 398.

It is generally agreed that shipworm growth, survival and reproduction is dependent upon the presence of an untreated wood supply, water with constant salinities within certain ranges and water temperature within certain ranges.

At the center of this issue of preemption is the cooling system used by defendant. It was described by the trial judge as follows.

> Defendant's nuclear power plant utilizes a once-through cooling system to cool the steam produced by the defendant's condenser. Water used for this system is brought from the south branch of Forked River and is discharged into Oyster Creek. When water is drawn from the south branch of Forked River, this causes a partial reversal of the normal flow of the river. Through a suction-type operation, saline water is drawn from Barnegat Bay to Forked River, thereby making part of the river saline instead of its natural fresh water state.

The issue of federal preemption as it applies to this nuclear generating station and its cooling system was considered by the Supreme Court in State v. Jersey Central Power & Light Co., supra. After noting that a nuclear power plant cannot operate without a license from the Atomic Energy Commission and that it must "function in accordance with the license terms, including all technical specifications set forth in or attached to the license," Id. at 112, the court held "Interference by the State, whether by statutory penalty, injunction or monetary damages, with these facets of nuclear power generation, regulation of which has been vested exclusively with

the AEC, is not permissible."[1/] Id. at 115.

The plaintiffs concede that this is so but argue here, as they did in the trial court, that the exclusive authority granted to the AEC to license and regulate relates solely to facility construction and operation with respect to radiological hazards, leaving the State free to regulate activities relating to the power plant for purposes other than protection against radiation hazards.

1/ The Energy Reorganization Act of 1974, Pub. L.93-438, 88 Stat. 1233, which became effective January 19, 1975 abolished the Atomic Energy Commission and transferred its functions to two new agencies, Energy Research and Development Administration and Nuclear Regulatory Commission. All licensing and related regulatory functions of the Atomic Energy Commission have been transferred to the Nuclear Regularatory Commission. State v. Jersey Central Power & Light Co., 69 N.J. 102, n. 105.

The plaintiffs argue further that the exclusive federal regulatory jurisdiction over radiological hazards "in no way deprives a private citizen who has suffered personal or property damage from non-radiological impacts from pursuing his state tort claims against a licensee."

Plaintiffs contend the first seven counts of the complaint seek recovery for damages arising from the construction and operation of the nuclear generating station -- claims based solely upon injuries resulting from the plants non-radiological hazards caused by thermal pollution and environmental changes having no bearing upon the future operation of the plant's system for discharge of radioactive waste. To the contrary, the trial judge found that the alteration of water temperature is directly related to the cooling system which

was authorized, approved and licensed by the AEC. The defendant is licensed to operate as it does; it cannot operate in any other manner. He found that the radioactive waste disposal system is an integral part of the cooling system. 152 N.J. Super. at 398. That factual finding has ample support in credible evidence present in the record as a whole and we will not disturb it. Rova Farms Resort v. Investors Ins. Co., 65 N.J. 472 (1974).

The conclusions of the trial judge that plaintiffs' assertion of tort and statutory claims for damages constitute at least an indirect interference with defendant's radioactive waste discharge system is affirmed, substantially for the reasons expressed by him.

II.

RIGHT TO JURY TRIAL ON LIABILITY

From the inception of this litigation plaintiffs have demanded a jury trial of all issues. Defendant moved for a non-jury trial on the liability aspect of the plaintiffs' inverse condemnation claim. That motion was granted and that ruling is challenged as error. The parties agreed that plaintiffs' claim under the eighth count of the complaint was a claim for damages grounded in inverse condemnation. It was also conceded that should the liability of defendant be established, plaintiffs were entitled, as a right, to a jury trial on damages. The dispute concerned plaintiffs' claim that they were entitled to a jury trial on the liability aspect of their claim.

Plaintiffs initially argued that the trial judge improperly relied on the

convenience aspects of a judge trial as opposed to a jury trial, since it was represented the case would be lengthy and complicated. It is clear that neither complexity nor length of trial is sufficient to deprive a party of a jury trial if he is entitled to it as a matter of right. Keiffer v. Food Products Trucking Co., 73 N.J.Super. 285, 297 (App. Div. 1962), certif. den. 37 N.J. 524 (1962); Longo v. Reilly, 35 N.J. Super. 405, 410 (App. Div. 1955), certif. den. 25 N.J. 45 (1957). There is no complexity exception to the right of trial by jury under either the 7th Amendment to the U.S. Constitution or under the New Jersey Constitution. In re U.S. Financial Securities Litigation, 609 F.2d 411 (9th Cir. 1979), cert den. in Gant v. Union Bank, 446 U.S. 929, 64 L.Ed.2d 281, 100 S.Ct. 1866 (1980) leaving standing decision in 609 F.2d 411.

However, reading the conclusion of the trial judge on this motion as a whole we are satisfied he did not base his decision to grant the defendant's motion upon the complexity of the issues, or the convenience of a non-jury trial. He was of the view that there was no right to a jury trial on liability in a condemnation case and he so ruled.

Plaintiffs argue their case involves basically an action for damages based upon a taking of plaintiffs' properties. They contend they are not seeking the equitable relief of a condemnation, or contesting a condemnation. They claim their action is akin to a tort action, that a taking had occurred and they were simply seeking damages. They argue that as in any tort action the issues for factual determination were 1) whether the taking (or tort) had occurred, 2) were defendant's actions

the proximate cause of the same, and 3) damages. They argue that they did not seek equitable, injunctive, or declaratory relief and that they were entitled to a jury trial as of right. They buttress their arguments by citation to cases in seven other jurisdictions which they claim have decided that an inverse condemnation plaintiff has a right to a jury trial on liability as well as damages.[2/]

2/ Thornburg v. Port of Portland, 244 Or. 69, 415 P.2d 750 (1966); Wilson v. State Road Department, 201 So.2d 619 (Fla. Dist. Ct. App. 1967), cert. den. 207 So.2d 690 (1967); Cunningham v. Town of Tieton, 60 Wash 2d 434, 374 P.2d 375 (1962); Douglas County v. Abercrombie, 119 Ga. App. 727, 168 S.E.2d 870 (1969); Commonwealth Department of Highways v. Watson, 446 S.W.2d 294 (Ky. 1969); Tantalas v. Commonwealth, 392 Pa. 315, 140 A.2d 790, 791-792 (1958); Sanders v. State Highway Commission, 211 Kan. 776, 508 P.2d 981, 988-989 (1973).

"The constitutional guarantee that 'The right of trial by jury shall remain inviolate ***,' N.J. Const. (1947), Art. I, par. 9, merely preserves the right to a jury trial that existed at common law at the time the New Jersey Constitution of 1776 was adopted." Peterson v. Albano, 158 N.J.Super. 503, 506 (App. Div. 1978), app. dism. 78 N.J. 337 (1978); Plaza v. Flak, 7 N.J. 215, 224 (1951); Montclair v. Stanoyevich, 6 N.J. 479, 485 (1951); Steiner v. Stein, 2 N.J. 367, 378-379 (1949).

There are many civil proceedings known to the common law which were not triable as of right to a jury and hence were not embraced in the constitutional guarantee which came into force July 2, 1776. Steiner v. Stein, 2 N.J. at 379; cf. Montclair v. Stanoyevich, 6 N.J. at 483. There are also contemporary proceedings which were unknown at common

law which are outside the orbit of the constitutional guarantee of a jury trial (for a partial listing of such actions see 2 Schnitzer & Wildstein, N.J. Rules Service AIV 1256-1260).

Among such contemporary actions which are not triable to a jury as of right are proceedings to condemn property under the power of eminent domain. In Re Housing Authority of Newark, 126 N.J.L. 60, 64 (E.&A. 1941); Morris v. Comptroller, 54 N.J.L. 268, 273 (Sup. Ct. 1892).

Condemnation proceedings are instituted by the condemning authority to assure that the landowner whose property has been taken will receive proper compensation. Inverse condemnation proceedings are initiated by the landowner whose property has been taken de facto to obtain proper

compensation. In Re Jersey Central Power & Light Co., 166 N.J.Super. 540, 544 (App. Div. 1979). Both actions are controlled by the same statute. N.J.S.A. 20:3-1 et seq. Bayshore Sew. Co. v. Dep't of Env., N.J., 122 N.J. Super. 184, 202 (Ch. Div. 1973), aff'd 131 N.J.Super. 37 (App. Div. 1974). The owner's action of inverse condemnation is based on an alleged violation of both federal and state constitutional guarantees of just compensation for property taken for public use. This action is a modern day concept and post dates the constitutional right to jury trial. New Jersey's first Constitution of 1776 made no reference to the taking clause. It did not appear until the New Jersey Constitution (1844), Art. I. ¶ 16, Art. VII, ¶ 8. It appears in the United States Constitution in Amendments V and XIV.

The right to maintain such proceedings is foreign to the common law and as such the constitutional right to a jury trial does not attach. Kugler v. Market Dev. Corp., 124 N.J. Super. 314, 319 (Ch. Div. 1973); Quinchia v. Waddington, 166 N.J. Super. 247 (Law Div. 1979).

Although plaintiffs cite out-of-State cases in support of their contention that they are entitled to a jury trial, this issue is one that is decided by the individual States as the issue is related to the constitution, statutes and rules of procedure of the individual State. (See Port of N.Y. Auth. v. Heming, 34 N.J. 144 (1961), cert. den. 367 U.S. 487 (1961) where the court noted the different procedures employed by the individual States in condemnation proceedings. Id. at 156).

There are two basic issues involved in plaintiffs' claim. The second is damages, but before that issue can be

reached there must first be a determination as to whether there has been a taking, and if there has been, what is the nature and extent of the taking. The taking cannot be presumed. And as to that issue there is no right to a jury trial. We affirm the ruling of the trial judge.

III.

THE TRIAL COURT'S FACTUAL FINDINGS AND CONCLUSIONS

The plaintiffs' point heading on this issue is as follows.

> The Trial Court's Findings And Conclusions That The Dock of The Subclass 1 Plaintiff Had Not Been Destroyed by Shipworms, That JCP&L Had Not Proximately Caused The Shipworm Damages Suffered By The Other Plaintiffs, And That JCP&L Had Not Proximately Caused The Erosion Of Properties Owned By Plaintiffs In Subclasses 1, 2, 7 and 8 And The Siltation At Properties Owned by Plaintiffs In Subclasses 1 and 8 Were Clearly Mistaken and So Plainly Unwarranted That The Interests Of Justice Require That They Be Reversed And Corrected.

Plaintiffs contend that the trial judge's "general findings of fact" and the "factual findings relating to each Subclass" as well as his conclusions are patently in error, and correction and reversal by this court is warranted. Plaintiffs argue that the dispute does not center around credibility but rather involves the court's failure to properly evaluate the underlying facts and the implications to be drawn therefrom. Plaintiffs rely upon Pioneer National Title Ins. Co. v. Lucas, 155 N.J. Super. 332 (App. Div. 1978), aff'd o.b. 78 N.J. 320 (1978), where the standard of review was stated as follows:

> If we are satisfied that the trial judge's findings and result could reasonably have been reached on sufficient credible evidence in the record as a whole, his determination should not be disturbed. However, if we are thoroughly satisfied that the findings and the

> ultimate conclusions are clearly mistaken and so plainly unwarranted that the interests of justice demand intervention and correction, we should appraise the record as if we were deciding the matter at inception and make our own findings and conclusions. This feeling of "wrongness" arises where our review of the proofs leaves us with the definite conviction that the judge went so wide of the mark that a mistake must have been made. It can arise in many ways -- from manifest lack of inherently credible evidence to support significant findings, obvious overlooking or underevaluation of crucial evidence, or a clearly unjust result.
>
> [Id. at 338]

Defendant, on the other hand, argues that credibility of expert witnesses, as well as the "feel of the case" is involved and that the proper standard of review is that articulated in Rova Farms Resort v. Investors Ins. Co., 65 N.J. 474, 484 (1974) where the court said that findings on which a judgment in a non-jury case are based should not be disturbed unless "they are so wholly unsupportable as to result in a denial of justice." Id at

484. Stated otherwise, the factual findings and legal conclusions of the trial judge will not be disturbed unless the Appellate Court is convinced that they are so manifestly unsupported by or inconsistent with competent, relevant and reasonably credible evidence as to offend the interests of justice. Ibid.

At the end of the nine-day trial, the judge made findings and conclusions as to each of the Subclasses. Each of the Subclass representatives claimed to have suffered damages to one or more wood structures consisting of pilings, docks and bulkheads. The trial judge noted that no damage appeared to have occurred to structures constructed of pressure creosoted materials and pointed out that the conflicting testimony raised an issue as to whether the damages complained of resulted from

shipworm infestation or were the result of winter freezes of lagoon water which damaged pilings and docks.

The testimony presented was technical, complicated and voluminous. The resolution of the sharply divergent factual statements and expert opinions required a delicate weighing and balancing of the evidence presented. Our review of this record satisfies us that there was sufficient credible evidence presented as to each of the Subclasses on which the trial judge could base his conclusions. We reach the same result applying either the test as it is stated in Rova Farms or Pioneer National Title Ins. In our review of the record we did not encounter a feeling of wrongness, nor did we find the ultimate conclusions of the trial judge clearly mistaken or plainly unwarranted.

Affirmed.

		SUPERIOR COURT OF NEW JERSEY LAW DIVISION - MORRIS COUNTY DOCKET NO.
GERRIT J. VAN DISSEL,	)	L-11299-75
Plaintiff	)	Filed July 25, 1977
vs.	)	
	)	Civil Action
JERSEY CENTRAL POWER & LIGHT COMPANY, A Corporation of New Jersey	)	OPINION
Defendant	)	Decided: July 22, 1977

STEIN, J.C.C., t/a

Defendant, Jersey Central Power & Light Company (hereafter "Jersey Central") moves to dismiss the complaint in this action for lack of jurisdiction over the subject matter. See R. 4:6-2(a). Jersey Central contends that consideration of any and all aspects of plaintiff's suit--which concerns itself with the effects of the operation of Jersey Central's nuclear power plant at Oyster Creek in Lacey Township, Ocean County--is barred

by the doctrine of federal preemption.

Construction and operation of this same power plant, and the legal ramifications thereof, have already been reviewed at length in State v. Jersey Central Power & Light Co., 69 N.J. 102 (1976).

Two novel questions are presented by this motion:

1. Does the doctrine of federal preemption bar a private plaintiff from pressing tort claims for damages to his property allegedly arising from the governmentally-approved operation of defendant's nuclear power plant?

2. If such relief is not available to plantiff, can he seek damages for any asserted diminution in the market value of his property under the theory of inverse condemnation?

Plaintiff brings this class action on his own behalf and on behalf of all riparian property owners claimed to have an interest in property located on Forked River, Oyster Crrek, Barnegat Bay and various lagoons, canals and inlets which are tribuatries of those waterways. The defendant, Jersey Central, is a public utility of the State of New Jersey organized and existing pursuant to N.J.S.A 48:1-1, et seq.

Upon timely motion by defendant, this court first considered the question of whether or not this action should properly be maintained as a class action, and whether or not there were questions of law and fact common to the claimed class, as well as whether or not the claimed class should be divided into subclasses for the purposes of this litigation. See, generally, R. 4:32-1 and

R. 4:32-2(d). In addition to the moving and answering papers, the court has had the benefit of oral testimony from an expert witness produced by plaintiff who testified at considerable length on such matters as the operation of defendant's nuclear power reactor plant and the cause of certain conditions which, it is contended, caused damage to the property of plaintiff and those in his claimed class.

During the course of these hearings, it became increasingly apparent that this court might not have subject matter jurisdiction over all or part of the claims made against this defendant by plaintiff. Accordingly, defendant moved to dismiss all of plaintiff's claims because of lack of jurisdiction over the subject matter, pursuant to Rule 4:6-2(a). As stated above, the defendant relies on the doctrine of federal preemption. See

State v. Jersey Central Power & Light Co., supra.

The gravamen of plaintiff's multi-count complaint is that his property, more specifically his dock and other structures and appurtenances which abut or extend into one of the above listed waterways, have been injured by the operation of Jersey Central's nuclear power plant located between Oyster Creek and Forked River in Lacey Township. This damage allegedly arose from the infestation of "shipworms" into these various waterways. It is claimed that the "worms" burrow into wooden structures and eventually cause their destruction by eating away the wood. It is further asserted that this infestation of ship worms was and is caused by the operation of Jersey Central's nuclear power plant.

Plaintiff's complaint requests money damages, and, additionally, seeks to enjoin defendant from further operation of its power plant "in a manner which will cause damage to plaintiff and other members" of his class. For reasons more fully set forth herein, it is obvious that if plaintiff is barred from a money damage claim because of federal preemption, then injunctive relief will also be barred.[1/]

Shipworms, members of the phyllum mollusk, are a type of clam. Plaintiff alleges the defendant's nuclear plant has caused an infestation of shipworms indigenous to the area in which plaintiff and members of his claimed class own

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1/ It should be noted that while plaintiff seeks ultimate injunctive relief, no such interim request has yet been made by plaintiff pending the outcome of this litigation.

property, and that increased as well the area in which that type of shipworms live. Further, it is asserted that the breeding period of two speciies of the native genus of shipworms--teredo navalis and bankia gouldi--has been extended. Plaintiff also claims that two subtropical speciies of the genus of shipworms--teredo pfurcifera and teredo bartschi--are now found in large numbers in the area. These subtropical species are not indigenous to the Barnegat Bay area. Plaintiff asserts that the proliferation of the subtropical species of shipworms was also caused by the operation of defendant's nuclear plant. Three elements are needed for the various types of shipworms to thrive: wood, sufficiently warm water temperature and a sufficient amount of water salinity.

Defendant's nuclear power plant utilizes a once-through cooling system to cool the steam produced by the plaintiff's condenser. Water used for this system is brought from the south branch of Forked River and is discharged into Oyster Creek. When water is drawn from the south branch of Forked River, this causes a partial reversal of the normal flow of the river. Through a suction-type operation, saline water is drawn from Barnegat Bay to Forked River thereby making part of the river saline instead of its natural fresh water state.

Since the various types of shipworms cannot survive in fresh water, it is alleged that the operation of defendant's plant has caused an increased area in which shipworms may survive, thrive and proliferate. Additionally, discharge of

saline water into Oyster Creek has changed that waterway from fresh to salt water. Further, it is alleged that the discharged water becomes hotter when it cools the condenser of the plant. Plaintiff claims that this discharge of heated water circulates and causes an increase in the water temperatures in the waterways on which plaintiff and his claimed class own property. This increased temperature permits indigenous shipworms to have a longer breeding period and to have a lower mortality rate during the winter months. The elevated temperature also permits the subtropical species, not indigenous to the area, to survive and proliferate. In brief, it is alleged that the operation of defendant's nuclear power plant causes, extends and creates an environment in which shipworms thrive.

This once-through cooling system of Jersey Central's nuclear plant also serves as part of the plaintiff's radioactive waste ("radwaste") discharge system. The radwaste discharge system collects, processes, stores and reclaims or disposes of all liquids that may contain certain radioactive material. the purpose of the radwaste system is to reduce the radioactive contents in liquid effluents and to reclaim higher purity water for reuse in the plant system. The radwaste discharge system is "piggybacked" onto the once-through cooling system. This once-through cooling system thereby functions to dilute the radwaste discharge.

Plaintiff alleges claims based upon various theories of liability including negligence, nuisance, strict liability in tort, inverse condemnation and violations

of various state and federal statutes. Relying on the recent decision of the New Jersey Supreme Court in State v. Jersey Central Power & Light Co, supra, defendant asserts that this court lacks subject matter jurisdiction over any and all aspects of this case.

Because of the differing theories upon which plaintiff relies, there will first be considered the tort claims of plaintiff and then, as a separate matter, the claim of inverse condemnation.

THE TORT CLAIMS

In State v. Jersey Central Power & Light Co., supra, the State through the Department of Environmental Protection brought suit against Jersey Central for penalties and damages arising from the deaths of a large number of menhaden

fish. The State contended that these deaths resulted from the sudden flow of cold water into Oyster Creek after a temporary shutdown of the same nuclear power plant which is the subject matter of this litigation. While holding that the State had not proved the existence of proximate cause, the Supreme Court additionally held that "a finding of nonliability for Jersey Central is also dictated by federal preemption." 69 N.J. at 111. The court further noted:

> *** Application of N.J.S.A. 23:5-28 and the assertion of damages by the State either as parens patriae or public trustee are not permissible under the circumstances because of infringement upon and conflict with a subject matter over which Congress has vested exclusive jurisdiction in the AEC. Id.

The court then concluded that the state may not directly or indirectly

interfere with this federally preempted area of regulation. Regulation by the state is restricted to "activities for purposes other than a protection against radiation hazards." 69 N.J. at 112; see 42 U.S.C.A. §2021(k)[2/]

Plaintiff advances a two-pronged argument in an effort to distinguish Jersey Central. First, the plaintiff

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2/ In these preliminary proofs before the court, plaintiff has prima facie demonstrated that the operation of Jersey Central's plant is a proximate cause of his damage and injury. In the Jersey Central decision, the shutting down of the plant which resulted in the flow of cold water was held not to be the proximate cause because the surrounding waterways were returned to their natural state. In this case, operation of the plant is claimed to have altered the natural state of the waterways by increasing water temperature and salinity.

claims that a suit seeking damages arising from a normal operation of the once-through cooling and discharge system is not "regulation" by the State for the purpose of protection against radiation hazards. Plaintiff asserts that if a suit seeking such relief can be construed as "state regulation," all that such litigation attempts to "regulate" is the temperature and salinity of the discharge water. However, such a contention overlooks the fact that the radwaste discharge system is "piggybacked" onto the once-through cooling system. Thus, if one system is regulated, the other system is similarly regulated. The radwaste discharge system cannot be regulated by the state because it is clearly deesigned and utilized as part and parcel of the system installed--

with federal approval--to protect against radiation hazards. See 42 U.S.C.A. §2021(k). Regulation of this once-through cooling system, which is so integrally tied to the radwaste discharge system, is at least an indirect regulation of the radwaste discharge system. Interference with such regulation is clearly impermissible under State v. Jersey Central Power & Light Co., supra.[3/] See

3/ Plaintiff also claims that the "piggybacking" of the two systems is unnecessary. The affidavit of plaintiff's expert stated:

> This "piggybacking" of the liquid radwaste discharge system on a part of the once through cooling system is not an essential characteristic of the operation of a nuclear power plant. For example, a parallel canal could have been constructed for radwaste discharges and separate dilution pumps could have been utilized. (However, such designs are not in use currently.)

This contention is without merit. State v. Jersey Central Power & Light Co., supra, considered the same argument concerning the disposal of radwaste and held that the doctrine of preemption precluded the consideration of the issue. 69 N.J. at 115.

also, Northern States Power Co. v. Minnesota, 447 F. 2d 1143 (8th Cir. 1971), aff'd. mem. 405 U.S. 1035, 92 S. Ct.1307, 31 L. Ed. 2d 576 (1972).

The second basis upon which plaintiff moves to avoid the preemption doctrine is that the Atomic Energy Act of 1954, as amended (42 U.S.C.A. §2011, et seq.) did not preempt private citizens from maintaining traditional common law remedies against the licensee, Jersey Central. To support its position, plaintiff relies upon Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W. 2d 266 (Ct. App. 1975), as well as the legislative history of that Act.

In Marshall, an individual plaintiff brought suit against the power company

seeking a declaratory judgment that defendant's proposed power plant would constitute either a public or a private nuisance. The Michigan intermediate appellate court held that the suit was premature because at that time it was unclear as to when, if at all, and under what conditions the plant could be built. 237 N.W. 2d at 283-284. The factual basis of the nuisance complained of was that the cooling pond of the power plant caused accumulation of ice during the winter on plaintiff's property, and that fogging and icy conditions would make driving hazardous during the winter. The court held that it was not preempted from considering those issues as they were founded on a common law nuisance theory. 237 N.W. 2d at 275. There is no indication that any radwaste discharge system was

"piggybacked" on the cooling pond as in this case. In short, the Marshall court was careful to point out that it was not dealing with radiolcgical hazards from the plant. 237 N.W. 2d at 275, 276-277. Thus, it is clear that the court in Marshall would have considered damage claims arising from radiological hazards, including radioactive waste releases, to hve been preempted. See 237 N.W. 2d at 277-278.

Marshall is of no assistance to plaintiff. Here, unlike in that case, plaintiff's claim is based upon damages from the operation of that portion of Jersey Central's plant which is designed to protect against hazards arising from the emission of radioactive waste.

In any event, to the extent that Marshall is inconsistent with Jersey

Central, our Supreme Court's decision is obviously binding on this court.

Plaintiff further argues that Congress did not intend to preempt private individuals from asserting common law claims against licensees of the Atomic Energy Commission (now the National Regulatory Commission). He points to the legislative history of the 1957 Price-Anderson Amendment to the Atomic Energy Act, as subsequently amended.

This amendment, in current form, requires the United States to be an indemnitor for reactor operators up to a certain sum when damage results from a "nuclear incident." 42 U.S.C.A. §2210; see, also, 1957 U.S. Code Cong. & Admin. News, p. 1816. For the legislative history of subsequent amendments to the Price-Anderson Amendment, see 1966 U.S.

Code Cong. & Admin. News, pp. 3206-3209; 1964 U.S. Code Cong. & Admin. News, p. 2662; 1962 U.S. Code Cong. & Admin. News, pp. 2215-2216.

The obvious intent of the Price-Anderson Amendment and its subsequent amendments was to protect the public from a nuclear incident. The federal courts are vested with original, but not exclusive, jurisdiction to entertain such claims. 42 U.S.C.A. §2210(o). The term "nuclear incident" is defined by the statute as

> *** [A]ny occurrence *** within the United States causing *** damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material ***. 42 U.S.C.A. §2014(q), as amended, 89 Stat. 1111, Pub. L. 94-197 (1975).

Plaintiff's claimed injury or damage does not arise out of or result from the radioactive property contained in the

radwaste discharge system. The increased temperature and salinity was not caused by those properties inherent in the radwaste discharge. Cf. State v. Jersey Central Power & Light Co., supra, 69 N.J. at 110. Application of the Price-Anderson Amendment is inappropriate to this case.

Plaintiff additionally argues that the history of the Price-Anderson Amendment indicates that Congress did not intend to preempt the whole field of tort liability relating to atomic power. However, it is clear that Congress did intend to preempt state control of activities in matters relating to protection against radiation hazards. 42 U.S.C.A. §2021(k); State v. Jersey Central Power & Light Co., supra; Northern States Power Co. v. Minnesota, supra; Marshall v. Consumers Power Co., supra. From this entire field preempted

by Congress, state courts have been granted concurrent jurisdiction to hear only those private cases arising from nuclear incidents. This case does not arise from a "nuclear incident" under 42 U.S.C.A. §2014(q) as amended.

Any doubt about this question is put to rest by the New Jersey Supreme Court in State v. Jersey Central Power & Light Co., supra:

> *** The cessation of the plant's functioning, emission of radioactive waste and dilution of that waste (obviously to protect against radiation hazards) were requirements included in the license. Interference by the State, whether by statutory penalty, injunction or monetary damages, with these facets of nuclear power generation, regulation of which has been vested exclusively with the AEC, is not permissible. 69 N.J. at 115 (footnote omitted).

Plaintiff's attempts to seek money damages through the vehicle of tort claims constitute at least an indirect

interference with the defendant's radwaste discharge system. Such state interference is impermissible. This court lacks subject matter jurisdiction over all of plaintiff's claims based upon tort liability and statutory violations. Defendant Jersey Central's motion to dismiss those counts relating to such claims is granted.*

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* The balance of Judge Stein's Opinion concerned the inverse condemnation claim and is not relevant to the question raised in the present Petition.

Filed September 19, 1977

GERRIT J. VAN DISSEL, Plaintiff, -vs- JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey, Defendant	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - MORRIS COUNTY Docket No. L-11299-75 Civil Action ORDER GRANTING MOTION TO DISMISS COMPLAINT FOR LACK OF JURISDICTION AS TO ALL COUNTS THEREOF EXCEPT THE EIGHTH COUNT.

This matter being opened to the Court, the Honorable Arnold M. Stein, J.C.C., t/a presiding, on Motion to Dismiss for Lack of Jurisdiction made by the defendant herein, and there appearing Clarence P. Reberkenny, Esq., of the firm of Hyland, Davis & Reberkenny, attorneys for the defendant, Jersey Central Power & Light

Company, and Alan R. Hoffman, Esq. (specially admitted), and Eugene M. Friedman, Esq., of the firm of Friedman and Greb, attorneys for the plaintiff, Gerrit J. Van Dissel, and the Court having considered the pleadings, briefs and affidavits filed and oral testimony, as well as the oral arguments of counsel;

IT IS, on this 16th day of September, 1977, ORDERED and ADJUDGED:

(A) that this Court lacks subject matter jurisdiction over all counts of the Complaint except the Eighth Count, and, defendant's motion is, accordingly, hreby granted except as to said Eighth Count; and

(B) as to said Eighth Count, treating the defendant's motion as also one moving

for summary judgment, such motion is hereby denied; and

(C) the disposition set forth in (A) and (B) hereinabove is in accordance with the written Opinion of the Court dated July 22, 1977. *

Arnold M. Stein,
J.C.C., t/a

* this order is effective as of August 22, 1977 pursuant to R. 4:42-1(a).

Filed December 18, 1979

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
OCEAN COUNTY

DOCKET NO. L-11299-75

GERRIT J. VAN DISSEL, et als., Plaintiffs vs. JERSEY CENTRAL POWER & LIGHT COMPANY, Defendant.	)	CIVIL ACTION ORDER TO DISMISS COMPLAINT

This matter coming before the Court for trial, without a jury, in the presence of Clarence P. Reberkenny, Esquire, of Davis & Reberkenny, Esquires, attorneys for the defendant, and Edward J. Dauber, Esquire of Greenberg & Dauber, Esquires, Alan R. Hoffman, Esquire of Lynch, Brewer, Hoffman & Sands, Esquires, and Eugene M. Friedman, Esquire of Friedman and Greb, Esquires, attorneys for the plaintiffs;

IT IS on this 17th day of December, 1979, ORDERED, that defendant's motion to dismiss the complaint is granted.

HAROLD KAPLAN, J.S.C.

Filed November 19, 1975

Plaintiff,	)	
	)	
GERRIT J. VAN DISSEL	)	
	)	
VS.	)	DOCKET NO.
	)	L-11299-75
Defendant,	)	
	)	CIVIL ACTION
JERSEY CENTRAL POWER	)	
& LIGHT COMPANY	)	COMPLAINT
A Corporation of New	)	
Jersey	)	

FIRST COUNT

Plaintiff, Gerrit J. Van Dissel, residing at Wellesley Hills, Massachusetts, is the owner of certain waterfront property at 2708 Compass Drive, Bayside Beach, Forked River, lacey Township, Ocean County, New Jersey, for himself and all others similarly situated, says:

1. He brings this actionon his own behalf and as a class action pursuant to R.4:32-1, et seq., on behalf of all riparian property owners with property

located on Forked River, Oyster Creek, Barnegat Bay and the various lagoons, canals and inlets which are tributory thereto whose property has been damaged as a result of the ecological and environmental changes in the said bodies of water as a result of the opreration by defendant of the Oyster Creek Nuclear Generating Station.

2. The class of which plaintiff is a member is so numerous that joinder of all members is impracticable, there are questions of law or fact common to the class, and the claims of the representative party are typical of the claims of the class and the representative party will fairly and adequately protect the interests of the class. The questions of law or fact common to the members of the class predominate over any questions affecting

only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

3. The defendant, Jersey Central Power & Light Company, a New Jersey Corporation with a principal place of business in Morristown, New Jersey, owns and operates the Oyster Creek Nuclear Generating Station, which is located at Oyster Creek in Lacey and Ocean Townships, Ocean County, New Jersey.

4. On or about January 1, 1970, the defendant began operating the aforesaid generating station and has continued to operate the generating station up to the present time.

5. Defendant, by its negligence in discharging heated water into Oyster Creek and by certain other activities

over the last five years at the Oyster Creek Nuclear Generating Station, has effected certain deleterious ecological and environmental changes in the aforementioned bodies of water, which changes have proximately resulted in the proliferation of certain marine pests, including but not limited to "shipworms". The proliferation of said marine pests resulting from defendant's operation of the generating station, as aforesaid, has proximately caused extensive damage to the plaintiff's property and to the property of the other members of the class.

6. The damage to the plaintiff's property and that of the other members of the class was the proximate result of the defendant's negligent operation of its generating station.

7. By reason of the foregoing, plaintiff, together with all other members of the class, has suffered and will continue to suffer in the future great damage to his and their property and has been and will in future be compelled to spend large sums of money for preventative measures, repairs, and maintenance.

SECOND COUNT

1. Paragraphs 1 through 7 of the First Count are included herein by reference, as if fully set forth.

2. In the operation of its generating station, as aforesaid, the defendant has committed a nuisance which has resulted in special damage to plaintiff's property and that of the other class members.

THIRD COUNT

1. Paragraphs 1 through 7 of the First Count are included herein by reference, as if fully set forth.

2. Defendant's operation of its generating station has resulted in a trespass to plaintiff's property and that of the other class members, for which the defendant is responsible.

FOURTH COUNT

1. Paragraphs 1 through 7 of the First Count are included herein by reference, as if fully set forth.

2. The defendant is strictly liable in tort for damages to plaintiff's property and that of the other class members resulting from the operation of its generating station.

FIFTH COUNT

1. Paragraphs 1 through 7 of the First Count are included herein by reference, as if fully set forth.

2. Defendant's operation of its generating station and its discharge of hazardous, deleterious, destructive and poisonous pollutants into New Jersey waters has constituted a continuing violation of N.J.S.A. 23:5-28 and N.J.S.A. 58:10-23.1, et seq.

SIXTH COUNT

1. Paragraphs 1 through 7 of the First Count are included herein by reference, as if fully set forth.

2. The defendant's operation of its generating station and its discharge of said pollutants into the navigable waters of the Unitd States has constituted a continuing violation of the Refuse Act of

1899, 33 U.S. Code, Section 407.

SEVENTH COUNT

1. Paragraphs 1 through 7 of the First Count are included herein by reference, as if fully set forth.

2. Defendant's operation of its generating station and discharge of said pollutants into the waters of the United States has constituted a continuing violation of the Federal Water Pollution Prevention and Control Act, 33 U. S. Code, Section 1251, et seq.

EIGHTH COUNT

1. Paragraphs 1 through 7 of the First Count are included herein by reference, as if fully set forth.

2. Defendant's operation of its generating station and the damage caused thereby has resulted in the unlawful

taking of private property without just compensation.

WHEREFORE, plaintiff demands judgment on each count for;

(a) Damages,

(b) Costs of suit,

(c) That defendant be enjoined from further operation of the Oyster Creek Nuclear Generating Station in a manner which will cause damage to plaintiff and other members of the class,

(d) Such other relief as the court may deem appropriate in the premises.

FRIEDMAN and GREB,
Attorneys for Plaintiff

by _____
Eugene M. Friedman,
A Member of the Firm

DEMAND FOR JURY

Plaintiff demands trial by jury of twelve on all issues raised in the foregoing Complaint.

FRIEDMAN and GREB,
Attorneys for Plaintiff

by _____
Eugene M. Friedman,
A Member of the Firm

Filed September 1, 1976

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION -
MORRIS COUNTY
Docket No.
L-11299-75

GERRIT J. VAN DISSEL,
Plaintiff

-vs-

JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey,
Defendant

Civil Action

NOTICE OF MOTION TO DISMISS COMPLAINT

TO: Eugene M. Friedman, Esq.,
FRIEDMAN and GREB,
Attorneys for Plaintiff,
One East Clinton Street,
Dover, N. J. 07801

Alan R. Hoffman, Esq.,
KAPLAN, LATTI and FLANNERY,
95 Commercial Wharf,
Boston, Massachusetts 02110

SIRS:

PLEASE TAKE NOTICE that the defendant, Jersey Central Power & Light Company, will

move before the Honorable Arnold M. Stein for an order dismissing the Complaint on the ground that the Court lacks jurisdiction of the subject matter of the within law suit.

On said motion, defendant will rely on the affidavits annexed hereto and its beief submitted in support hereof.

HYLAND, DAVIS & REBERKENNY,
Attorneys for Defendant,

BY _____
Clarence P. Reberkenny

Dated: August 30, 1976

Filed September 1, 1976

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION -
CAMDEN COUNTY
Docket No. L-11299-75

GERRIT J. VAN DISSEL, Plaintiff -vs- JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey, Defendant	Civil Action AFFIDAVIT IN SUPPORT OF MOTION OF DEFENDANT TO DISMISS FOR LACK OF JURISDICTION

STATE OF NEW JERSEY:
ss.
COUNTY OF MORRIS :

DONALD ROSS, of full age, being duly sworn according to law upon his oath deposes and says:

1. I am employed by Jersey Central Power & Light Company as Manager-Generating Stations - Nuclear, including the Oyster Creek Nuclear Generating Station located at Lacey Township, Ocean County, New Jersey.

2. I have held the aforesaid position for the last four years.

3. In addition to serving as a heat dissipation system, the once through cooling system at said plant also serves as part of a radwaste discharge system.

4. The radwaste system collects, processes, stores, and reclaims or disposes of all liquids that may contain radioactive material. Liquid wastes from throughout the plant are transferred to appropriate collection taks in the radwaste building for treatment. the primary objectives of treatment are to reduce the radioactivity in liquid effluents to as low as practicable and to reclaim high purity water for reuse in the plant systems.

5. Protection against inadvertent discharge of liquid radioactive waste is

provided for by redundancy in valving, by radiation instrumentation for detection and alarm in case of abnormal conditions, and through procedural controls.

6. There is a monitor on the radwaste discharge line downstream of the discharge valve which detects any radwaste discharge in excess of our license limits.

Donald Ross

Sworn to and subscribed
before me this 30th day
of August, 1976.

PHYLLIS A. KABIS
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Aug. 16, 1979

Filed September 1, 1976

	SUPERIOR COURT OF NEW JERSEY LAW DIVISION - MORRIS COUNTY
GERRIT J. VAN DISSEL, Plaintiff -vs- JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey, Defendant	Docket No. L-11299-75 Civil Action AFFIDAVIT IN SUPPORT OF MOTION OF DEFENDANT TO DISMISS FOR LACK OF JURISDICTION

DONALD R. REES, of full age, being duly sworn according to law upon his oath deposes and says:

1. I was the project Manager employed by General Public Utilities Corporation, parent company of Jersey Central Power & Light Company, the defendant in the above matter, for the Oyster Creek Nuclear Generating Station.

2. I make this affidavit on behalf of said defendant.

3. The defendant, Jersey Central Power & Light Company (hereinafter referred to as "JCP&L"), is a public utility which operates an electrical energy transmission and distribution system which covers 43% of the State of New Jersey. Over two million people are served in the State of New Jersey by the defendant. The Oyster Creek plant alone produces over one-half of the energy consumed annually by defendant's customers. In addition to its own energy requirements, JCP&L has interconnecting commitments with systems of other New Jersey companies and those of other states.

4. In early 1961, because anticipated population and industrial growth would place an energy demand upon JCP&L in excess of its then present generating

capacity, the company acquired the Oyster Creek site after extensive exploration. The site was originally acquired for the construction of a coal-fired generating station with an anticipated capacity of 1,000 megawatts.

5. However, JCP&L's experience in connection with an experimental nuclear reactor project conducted jointly with other companies, the rising cost of coal transportation, the experience of other utilities, and advancements in nuclear technology, lead to an investigation of the technical and economic feasibility of a nuclear reactor as the power source for the Oyster Creek plant. As a result of the study, it was concluded by the company that electrical energy could be produced from a nuclear reactor at this site at a unit cost which would be competitive with that of a conventionally

fired generating station at the same site with less pollutant discharge into the atmosphere.

6. In 1964, JCP&L applied to the Atomic Energy Commission (AEC) for both a construction permit and an operating license for a boiling water nuclear fuel reactor at Oyster Creek. JCP&L filed data which was used by the AEC in evaluating the adequacy of the proposed site for a reactor of the power level and type planned. After concluding that the data gave reasonable assurance that the reactor could be constructed and operated without endangering the health and safety of the public based on the information submitted, the AEC conducted public hearings at Toms River, New Jersey, on October 14, 15 and 16, 1964, at which time evidence was taken and witnesses were cross-examined. As a result of the hearings, the AEC on December 4, 1964,

issued a provisional construction permit.

7. On November 18, 1964, the New Jersey Board of Public Utility Commissioners (PUC) approved the issuance and sale by JCP&L of debentures in the aggregate amount of $5,000,000. the purpose of this issue was the initiation of a financing program for the construction of the power plant.

8. There is attached hereto and marked Exhibit A a portion of the transcript of a hearing before the Board of Public Utility Commissioners of the State of New Jersey on April 13, 1965 in Trenton, New Jersey, containing the testimony of Robert A. Roe, then Commissioner of Conservation and Economic Development.

9. The PUC heard testimony on all phases of the construction and operation

of the plant including various methods and designs of cooling water systems.

10. During the course of the hearings, all parties agreed that the volume and velocity of the cooling water through the estuaries might well cause shoaling with a resultant effect on navigation and boating in these waters. JCP&L agred that if such shoaling was caused by the cooling water flows, it would be responsible for correcting it.

11. On November 15, 1965 the Board of Public Utility Commissioners of the State of New Jersey (hereinafter called PUC), issued an Order and Opinion of that date, a copy of which is attached hereto and designated as Exhibit B.

12. Subsequent to the issuance of that First Interim Order by the PUC, a Stipulation dated February 14, 1966 was entered into between JCP&L and the

Department of Conservation and Economic Development of the State of New Jersey (hereinafter called DC&ED), a copy of which is attached hereto and marked Exhibit C.

13. JCP&L and DC&ED (now Department of Environmental Protection) agreed, in the aforementioned Stipulation, that construction of the proposed intake and discharge canals would "alter the present characteristics of the existing estuarine environment in Oyster Creek and the South Branch of Forked River;..." (Emphasis supplied). It was agreed that research and investigations would be conducted jointly by the State and JCP&L whereby the fish population and its habitat of the estuaries of Oyster Creek, Forked River, Forked River South Branch and neighboring portions of Barnegat Bay, and the environs would be studied with the

view of ascertaining the effect of the proposed plant operations on the environment of the bay and on the marine life of the environs. JCP&L also agreed in said Stipulation to appropriate and commit $75,000 toward the cost of the above mentioned studies.

14. Subsequent to the filing of said Stipulation with the PUC, the PUC issued its Second Interim Order and Opinion on April 22, 1966, a copy of which is attached hereto and marked Exhibit D.

15. The PUC, in its Second Interim Order dated April 22, 1966, approved the aforementioned Stipulation.

The PUC stated (p.4):

> "All agree that the intake water to the plant will undergo a temperature rise of approximately 20°F at discharge and that some cooling water system is necessary to minimize the effect of the increase both in the Bay and the estuaries.

DC&ED has stressed that the use of the estuaries as discharge canals will be nearly destructive of this relatively unique environment. (Emphasis supplied)

It also assents that destruction of this environment on a large scale would cause significant losses in some species of fish and concludes that the maximum permissible discharge temperature must be fixed at 86°F to minimize these consequences."

and (at p.5):

"Recognizing the uncertainties as to effect of a temperature increment on finfish, DC&ED has agreed that Jersey Central should be permitted to proceed with construction of the proposed cooling water canal system, in lieu of cooling towers... conditioned on the Board's approval of an agreement between DC&ED and Jersey Central to undertake a joint investigation study and research program to evaluate the environmental effects on those areas of Barnegat Bay affected by the plant's discharge waters."

and (at p.7):

"*....the problem of changes in salinity in the estuaries as a result of the plant's operations. The record does not disclose any indication that this difficulty

> may be corrected through the design of the cooling system. Nor is there any proposal as to how the result may be avoided."

16. Thereafter, the PUC issued a Third Interim dated June 9, 1966, a copy of which is attached hereto and marked Exhibit E, wherein the PUC, upon recommendation of DC&ED, ordered the construction of the cooling water canals to commence in the presence of representatives of DC&ED.

17. Thereafter, the PUC issued its Fourth Interim Order, dated July 20, 1967, wherein the PUC ordered the connection of the cooling water canals to salt water, a copy of said Order being attched hereto and marked Exhibit F.

18. Actual construction of the plant was commenced in September 1964 and was completed in April 1969. A provisional operating license was issued by the AEC

in April 1969. Dredging permits for Oyster Creek and Barnegat Bay were obtained from the Army Corps of Engineers and the State of New Jersey, Bureau of Navigation, in July and August 1966. Dredging for the Oyster Creek discharge canal was commenced on August 13, 1966 and was completed on October 22, 1966. The plant reached 100% power on December 7, 1969 and commenced commecial operation on December 23, 1969.

19. Thereafter the plant, including the cooling system, was constructed, and it has been operating under a license granted by the AEC, under the federal Atomic Energy Act, 42 U.S.C.A. §2011, et seq, and the AEC regulations promulgated thereunder, 10 C.F.R. §50.1 et seq.

Four circulating pumps force the water which has entered the canal from Forked River through the plant.

This water is used to cool the steam in the condensers beneath the turbine generator. As planned, the water then flows into the discharge side of the canal and thence into Oyster Creek. There are three dilution pumps which propel other water directly through the canal without going into the plant. These are used mainly in the summer months to cool the water that comes from the circulating water pumps. When the plant is in operation the temperature of the water in Oyster Creek at the canal is increased about 20°F.

Donald R. Rees

Sworn to and subscribed
before me this 30th
day of August, 1976

ALICE J. HOUSE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 7, 1980

Filed September 15, 1976

		SUPERIOR COURT OF NEW JERSEY LAW DIVISION -
GERRIT J. VAN DISSEL,	)	MORRIS COUNTY
Plaintiff	)	Docket No. L-11299-75
VS.	)	CIVIL ACTION
JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey, Defendant	)	AFFIDAVIT IN OPPOSITION TO MOTION OF DEFENDANT TO DISMISS FOR LACK OF JURISDICTION

COMMONWEALTH OF MASSACHUSETTS: ss.

COUNTY OF MIDDLESEX :

My name is MICHAEL WARREN GOLAY. My address is 30 York Street, Lexington, Massachusetts. I am currently an Associate Professor of Nuclear Engineering at the Massachusetts Institute of Technology in Cambridge, Massachusetts. I have studied and taught the environmental impacts of nuclear power, with

special emphasis in the area of waste heat disposal. From 1972 to 1974, I held the Arthur D. Little Professorship in Environmental Sciences and Engineering at the Massachusetts Institute of Technology. My resume is attached as Exhibit A.

I have examined Table 3.1 and figures 3.3, 3.6, 3.7 and 3.8 of the Final Environmental Statement by the Directorate Of Licensing, U.S. Atomic Energy Commission Related To The Oyster Creek Nuclear Generating Station, Jersey Central Power & Light Company, Docket Number 50-219, Exhibit B, and the Affidavit of Donald Ross.

The purpose of the once through cooling system shown in the various figures is to cool condenser steam to liquid. This system utilizes

circulating or condenser cooling pumps, shown with an "x" on figure 3.3, and, when necessary, dilution pumps, shown with a "y" on figure 3.3.

The liquid radwaste discharge system at Oyster Creek utilizes a portion of the discharge canal of the once through cooling system. The radwaste system enters the canal at a point marked "z" on figure 3.3. Additionally, the dilution of radioactive wastes is accomplished when the radwaste discharge joins the waste heat disposal discharge flow. Only in that sense does the once through cooling system serve as part of a radwaste discharge system.

This "piggybacking" of the liquid radwaste discharge system on a part of the once through cooling system is not an essential characteristic of the operation

of a nuclear power plant. For example, a parallel canal could have been constructed for radwaste discharges and separate dilution pumps could have been utilized. (However, such designs are not in use currently.)

Using the water use figures which appear in table 3.1 as a base, I can state that the temprature increase in adjacent waters caused by the operation of the Oyster Creek Nuclear Generating Station is almost totally caused by the once through condenser cooling system. Any increase in water temperature due to radwaste discharge would be inconsequential.

_____
Michael Warren Golay

Sworn to and subscribed before
me this 9th day of September, 1976

_____
Edward M. Dargan
Notary Public

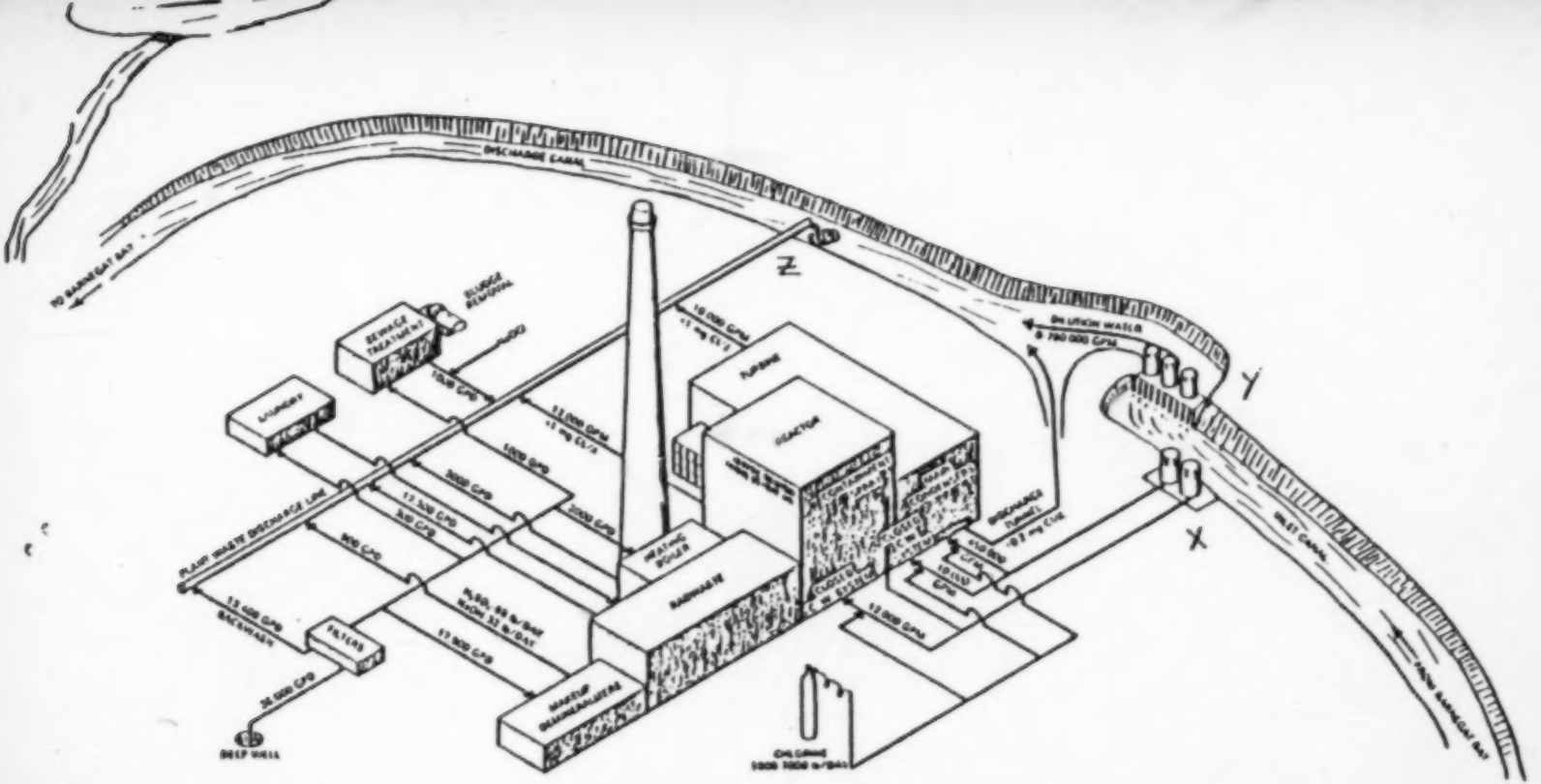

FIGURE 3.3 SIMPLIFIED FLOW SYSTEMS FOR WATER AND CHEMICALS

Filed January 29, 1980

SUPERIOR COURT OF
NEW JERSEY
LAW DIVISION
OCEAN COUNTY
DOCKET NO. L-11299-75

GERRIT J. VAN DISSEL,

Plaintiffs,

vs.

JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey,

Defendant

CIVIL ACTION - NOTICE OF APPEAL

TO: CLERK OF THE SUPERIOR COURT
State House Annex
Trenton, New Jersey -- 08625

HONORABLE HAROLD KAPLAN, J.S.C.
Ocean County Court House
Toms River, New Jersey -- 08753

CLARENCE P. REBERKENNY, ESQ.
ATTORNEY FOR DEFENDANT
DAVIS & REBERKENNY, ESQS.
499 Cooper Landing Road
Box No. 5459
Cherry Hill, New Jersey -- 08002

GENTLEMEN:

Notice is hereby given that plaintiffs hereby appeal to the Appellate Division of the Superior Court of New Jersey from the Order entered on December 17, 1979, in the above-captioned matter in the Superior Court of New Jersey, Law Division, Ocean County, the Honorable Harold Kaplan presiding.

GREENBERG, DAUBER & EPSTEIN
A PROFESSIONAL CORPORATION
ATTORNEYS FOR PLAINTIFFS

BY: _____
EDWARD J. DAUBER

DATED: January 28, 1980

Filed November 24, 1981

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-1871-79

GERRIT J. VAN DISSEL
Plaintiffs - Appellants

vs.

JERSEY CENTRAL
POWER & LIGHT COMPANY,
a corporation of
New Jersey,
Defendant - Respondent

CIVIL ACTION - NOTICE OF
PETITION FOR CERTIFICATION

TO: CLERK OF THE SUPERIOR COURT
APPELLATE DIVISION
State House Annex
Trenton, New Jersey -- 08625

CLERK OF THE SUPREME COURT
State House Annex
Trenton, New Jersey -- 08625

HONORABLE HAROLD KAPLAN, J.S.C.
Ocean County Court House
Toms River, New Jersey -- 08753

CLARENCE P. REBERKENNY, ESQ.
ATTORNEY FOR DEFENDANT
DAVIS & REBERKENNY, ESQS.
499 Cooper Landing Road
Box No. 5459
Cherry Hill, New Jersey -- 08002

GENTLEMEN:

Notice is hereby given that Plaintiffs-Appellants, Gerrit J. Van Dissel, et al, will petition the Supreme Court of New Jersey for certification to the Appellate Division to review the final judgment of the Appellate Division entered in favor of the Defendant-Appellee in this action on November 5, 1981.

GREENBERG, DAUBER & EPSTEIN
A PROFESSIONAL CORPORATION
ATTORNEYS FOR PLAINTIFFS

BY: _____
EDWARD J. DAUBER

LYNCH, BREWER, HOFFMAN & SANDS

BY: _____
ALAN R. HOFFMAN
Lynch, Brewer, Hoffman & Sands
Ten Post Office Square
Boston, Mass. 02109
(617) 482-5390

DATED: November 20, 1981

Filed December 18, 1981

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-1871-79

GERRIT J. VAN DISSEL, ET AL.,
Plaintiffs - Appellants

vs.

JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey,
Defendant - Respondent

CIVIL ACTION - NOTICE OF APPEAL

TO: CLERK OF THE SUPREME COURT
State House Annex
Trenton, New Jersey -- 08625

CLERK OF THE SUPERIOR COURT
APPELLATE DIVISION
State House Annex
Trenton, New Jersey -- 08625

HONORABLE HAROLD KAPLAN, J.S.C.
Ocean County Court House
Toms River, New Jersey - 08753

CLARENCE P. REBERKENNY, ESQ.
ATTORNEY FOR DEFENDANT
DAVIS & REBERKENNY, ESQS.
499 Cooper Landing Road
Box No. 5459
Cherry Hill, New Jersey -- 08002

GENTLEMEN:

Notice is hereby given that Plaintiffs-Appellants, Gerrit J. Van Dissel, et al, hereby appeal to the Supreme Court of New Jersey from the whole of the judgment of the Appellate Division of the Superior Court, the judges sitting therein being William G. Bischoff, P.J.A.D., Michael P. King, J.A.D., and Bertram Polow, J.A.D., entered on November 5, 1981 in favor of Defendant-Appellee, Jersey Central Power & Light Company, affirming the judgment of the Superior Court.

GREENBERG, DAUBER & EPSTEIN
A PROFESSIONAL CORPORATION
ATTORNEYS FOR PLAINTIFFS

BY: _____
EDWARD J. DAUBER

LYNCH, BREWER, HOFFMAN & SANDS

BY: _____
ALAN R. HOFFMAN
Lynch, Brewer, Hoffman & Sands
Ten Post Office Square
Boston, Mass. 02109
(617) 482-5390

DATED: December 17, 1981

Filed February 10, 1982

SUPREME COURT OF NEW JERSEY
C-344 SEPTEMBER TERM 1981

GERRIT J. VAN DISSEL, et al,	)	19,201
Plaintiffs-Petitioners,	)	
vs.	)	ON PETITION FOR CERTIFICATION
JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey,	)	
Defendant-Respondent.	)	

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1871-79 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 8th day of February, 1982.

/s/
Clerk

Filed February 17, 1982

SUPREME COURT OF NEW JERSEY
SEPTEMBER TERM

GERRIT J. VAN DISSEL, et al, Plaintiffs-Appellants	)	19,201
v.	)	ORDER DISMISSING APPEAL
JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey, Defendant-Respondent.	)	

This matter having been duly presented to the Court, it is ORDERED that the appeal in the within matter is dismissed pursuant to R.2:12-9.

WITNESS, the Honorable Robert N. Wilentz; Chief Justice, at Trenton, this 8th day of February, 1982.

/s/
Clerk

Filed March 16, 1982

SUPREME COURT OF NEW JERSEY
SEPTEMBER TERM

GERRIT J. VAN DISSEL, et al., Plaintiffs-Appellants,	)	
v.	)	19,201
JERSEY CENTRAL POWER & LIGHT COMPANY, a corporation of New Jersey, Defendant-Respondent	)	ORDER DISMISSING APPEAL

This matter having been duly presented to the Court, it is ORDERED that the appeal in the within matter is dismissed pursuant to R.2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 8th day March, 1982.

/s/
Clerk

Opposition

Office - Supreme Court, U.S.
FILED
JUN 8 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2065

In the
SUPREME COURT OF THE UNITED STATES

GERRIT J. VAN DISSEL, ET AL,
Petitioners

v.

JERSEY CENTRAL POWER & LIGHT
COMPANY, a corporation
of New Jersey,
Respondent

On Petition for Writ of Certiorari
to the Superior Court of New Jersey,
Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

Clarence P. Reberkenny
Robert F. Blomquist
Counsel for Respondent
DAVIS & REBERKENNY
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499 Cooper Landing Road
Cherry Hill, NJ 08002
(609) 667-6000

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NO. 81-2065

In the
SUPREME COURT OF THE UNTIED STATES

GERRIT J. VAN DISSEL, ET AL,
Petitioners

v.

JERSEY CENTRAL POWER & LIGHT
COMPANY, a corporation
of New Jersey,
Respondent

On Petition for Writ of Certiorari
to the Superior Court of New Jersey,
Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The respondent, Jersey Central Power & Light Company ("JCP & L"), a corporation and public utility of the State of New Jersey, respectfully requests that this Court deny the petition of writ of certiorari, seeking review of the Superior Court of New Jersey, Appellate Division's opinion in this case. That opinion is

reported at 181 N.J. Super. 516, 438 A.2d 563 (App. Div. 1981).

The facts of the case are stated fully in the decisions of the trial court (Petitioners' Appendix at 27 to 49) and the Superior Court of New Jersey, Appellate Division (Petitioners' Appendix at 1 to 26).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Should certiorari be granted to review the application of the settled doctrine of federal preemption upon a factual finding made below that the cooling-radwaste system was designed to protect against radiological hazards?

REASONS WHY THE WRIT SHOULD BE DENIED

I. NEITHER THE DECISION NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION. RATHER, THE DECISION BELOW TURNED ON A HIGHLY SPECIFIC FACTUAL FINDING WHICH LED TO THE CORRECT APPLICATION OF PRINCIPLES PREVIOUSLY APPROVED BY THIS COURT.

The sole Question Presented in the petition (Petitioners' Brief at 1) is whether common law tort claims:

> ". . . brought in state court by local property owners against the owner and operator of a nuclear power plant for damage to their property due to the plant's thermal pollution of local coastal waters [is] federally pre-empted by the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011 et. seq.?

But, neither the Superior Court, Appellate Division (hereinafter "Appellate Division") nor the trial court decided that question in this proceeding. Moreover, the facts of record will not support a determination of that question by this Court.

(1) In Part I of its opinion (Petitioners' Appendix at 6 to 13),[1] the Appellate Division merely held (a) that the trial court's factual finding that the AEC-licensed and approved "radioactive waste disposal system is an integral part of the[nuclear power plant's] cooling system" had "ample support in credible

---

1 Part II of the opinion (Petitioners' Appendix at 14 to 22) dealt with the trial court's determination to try the residual class action claim of inverse condemnation (liability) by a judge sitting without a jury. That claim,

evidence present in the record as a whole" and should not be disturbed. (Petitioners' Appendix at 12 to 13); and (b) that this correct factual determination was "at the center of [the] issue of pre-emption" (Petitioners Appendix at 9) since interference by state common law tort actions with the AEC-licensed, radioactive-waste ("radwaste") cooling system would be contrary to the comprehensive federal statutory scheme which vested exclusive authority to guard against radiological hazards in the Atomic Energy Commission.[2] (Petitioners'

---

is not raised in the petition and is not encompassed by the Question Presented. Part III of the opinion (Petitioners' Appendix at 22 to 26) dealt with the petitioners' claim below that the trial court's "general findings of fact and the factual findings relating to each subclass as well as his conclusions" were plainly in error (Petitioners' Appendix at 23). For the reasons discussed in the text, it is asserted that the question presented by the petitioners really involves an attack on the factual findings of the courts below and an attempt to have this Court grant certiorari in order to review the voluminous evidence of the nine-day trial and to discuss specific facts.

2 The Energy Reorganization Act of 1974,

Appendix at 9 to 13). Thus, the decisions below are based on the factual finding that the cooling-radwaste system which uses the saline waters of Barnegat Bay to cool the nuclear reactor and dilute the radwaste was authorized and approved by the AEC (now NRC), which agency mandated the system design as a protection against radiological hazards. As the Appellate Division stated:

> "The defendant is licensed to operate as it does, it cannot operate in any other manner." (Petitioners' Appendix at 13). (Emphasis provided).

Thus, the question which petitioners

Pub. L. 93-438, 88 Stat. 1233, which became effective January 19, 1975 abolished the Atomic Energy Commission, and transferred its functions to two new agencies, the Energy Research and Development Administration and Nuclear Regulatory Commission. All licensing and related regulatory functions of the Atomic Energy Commission have been transferred to the Nuclear Regulatory Commission. See generally, State v. Jersey Central Power & Light Co., 69 N.J. 102, n.105 (1976).

present to this Court cannot be extracted from the opinion below.

(2) Moreover, the trial court opinion which was affirmed by the Appellate Division, on a substantial credible evidence standard of review, does not present the formulation or the resolution of the Question Presented by the petitioners. The essence of the question is whether state common law tort actions for property damage are pre-empted due to a power plant's thermal pollution of local coastal waters. But the trial court opinion below does not turn on such a question or its allegation. The trial court finding below was that:

> "This once-through cooling system of Jersey Central's nuclear plant also serves as part of the defendant's radioactive waste ("radwaste") discharge system. The radwaste discharge system collects, processes, stores and reclaims or disposes of all liquids that may contain certain radioactive material. The purpose of the radwaste system is to reduce the radioactive contents in liquid effluents and to reclaim higher purity water

> for reuse in the plant system. The radwaste discharge system is "piggybacked" onto the once-through cooling system. This once-through cooling system thereby functions to dilute the radwaste discharge." (Petitioners' Appendix at 26)
>
> "Regulation of this once-through cooling system, which is so integrally tied to the radwaste discharge system, is at least an indirect regulation of the radwaste discharge system. Interference with such regulation is clearly impermissible under State v. Jersey Central Power Co [supra]. See also, Northern States Power Co. v. Minnesota, 447 F 2d 1143 (8th Cir. 1981), aff'd mem. 405 U.S. 1035 (1972)." (Petitioners' Appendix at 41 to 42). [footnote omitted]

(3) The facts of record, moreover, do not permit the formulation or the resolution of the Question Presented by the petitioners. What respondent has argued throughout these proceedings is that petitioners cannot maintain tort claims for salinity and temperature changes made to the waterways in question because such changes are inherent in the federally licensed cooling-radwaste system and interference with same is impermissible according to well-settled legal principles. However, petitioners have cavalierly argued

that this case involves "thermal pollution" rather than radiological hazards. But, the record will not support such a question or its allegations:

(a) To begin with, there were no proofs introduced which would prove thermal pollution since such term implies the discharge of water at excessive temperatures. The testimony of Mr. Roche (the key witness on the issue, whose credibility was believed by the trial court) was clear that the defendant utility never exceeded the temperature limits fixed by the federal regulatory authority. (T VIII, 25-10).

(b) If petitioners had proven that the respondent operated in a manner otherwise as "authorized, approved and licensed" (Petitioners' Appendix at 13), then, of course, an action in tort might be maintainable since such allowance would not constitute an interference with the regulatory scheme of the cooling system, which is so integrally tied to the radwaste discharge system.

(c) The whole argument made by petitioners, in their brief, relative to the Price-Anderson amendment and "congressional intent" (Petitioners' Brief at 37 to 43) is nothing more than a smoke screen to hide the simple fact that the cooling-radwaste system involves protection against radiological hazards and that petitioners' suit is not based on non-radiological hazards but rather on incidental results, involving salinity and temperature changes, flowing from operation of the federally approved cooling-radwaste system.

Thus, missing from this case are essential factual predicates of the Question Presented:

- Facts demonstrating that the AEC mandated radwaste-cooling system was designed to protect against "non-radiological hazards" as opposed to "radiological hazards";
- Facts demonstrating that respondent's plant operated in any other manner than it was "authorized, approved and licensed" to operate by the AEC; and
- Facts demonstrating thermal pollution.

Indeed, the thrust of petitioners' brief in support of certiorari is an attempt to ignore evidence adduced at the trial court level, and to discuss specific factual findings of the trial court (Petitioners' Brief at 34 to 36). But, the United States Supreme Court does not "grant certiorari to review evidence and discuss specific facts". United States v. Johnston, 268 U.S. 220, 227 (1925); Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 509 (1924). This Court is even less prone to take a case to review a factual issue where, like this proceeding, the findings of fact made by the trial court received the concurrence of the intermediate appellate court. (Petitioners' Appendix at 13). In such a situation, the Court has often held that "[a] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing

of error". Graver Mfg. Co. v. Lind Co., 336 U.S. 271, 275 (1949) and cases cited therein; Berenyi v. Immigration Director, 385 U.S. 630, 635 (1966).

Therefore, since review of factual matters in this proceeding would be "of no importance save to the litigants themselves", it is inappropriate to grant certiorari in this case. Rudolpf v. United States, 370 U.S. 269, 270 (1962). Indeed, this case involves a unique set of circumstances which is unlikely to recur. As such, the case is outside the scope of those considerations of importance which alone, as a matter of sound judicial discretion, justify the granting of a Writ of Certiorari. United States v. Shannon, 342 U.S. 288, 294, 295 (1951) (J. Frankfurter, separate opinion to dismiss writ as improvidently granted).

II. THE DECISION BELOW FOLLOWS AN UNBROKEN LINE OF AUTHORITY AND FULLY COMPORTS WITH THE DECISIONS OF THIS COURT.

In dismissing the common law and state statutory counts of petitioners' complaint, the courts below properly applied the doctrine of federal pre-emption and found a lack of subject matter jurisdiction to entertain those counts.[3]

The pre-emption analysis of the Appellate Division(Petitioners' Appendix at 6 to 13) cogently follows an unbroken line of authority from the New Jersey Supreme Court, State v. Jersey Central Power & Light Co., 69 N.J. 102, 112-113 (1976) which , in turn, is soundly based on a previous memorandum decision of this Court which determined that

---

3 On the issue of inverse condemnation, the trial court found that issue to be of constitutional import, therefore, it allowed that claim to proceed. Petitioner had their day in court in a nine-day trial during July, 1979. (Petitioners' Appendix at 4 to 5).

in regulating the operation of a nuclear power plant, the federal government has, under the Atomic Energy Act, exclusively pre-empted those aspects which involve protection against radiation hazards. Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1154 (8th Cir. 1971), aff'd mem. 405 U.S. 1035 (1972). (". . . the federal government has exclusive authority under the doctrine of pre-emption to regulate the construction and operation of nuclear power plants, which necessarily includes regulation of the levels of radioactive effluents discharged from the plant". Id.).[4]

The general principles of pre-emption analysis established by this Court have been strictly adhered to in the decisions

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4 It is submitted that the Court reaffirmed its memorandum holding of Northern States in Train v. Colorado Public Interest Group, 426 U.S. 1, 17 (1976) by ruling that the Atomic Energy Commission (now NRC) has exclusive control over the discharge of nuclear material.

below: Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (aim and intent of statute and legislative history to determine pre-emption question); Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978) (pervasiveness of federal regulatory scheme as authorized and directed by legislation and as carried into effect by a federal administrative agency); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) (nature of the subject matter regulated and whether it is one which demands exclusive federal regulation in order to achieve uniformity vital to national interests); and Hines v. Davidowitz, 312 U.S. 52 (1940) (whether under circumstances of particular case, state law stands as obstacle to the accomplishment and execution of the full purposes and objectives of congress).

Accordingly, the case fails to present a substantial federal question and is unworthy of a Writ of Certiorari.

III. THE ALLEGEDLY CONFLICTING DECISIONS PROFERRED BY PETITIONERS ARE DISTINGUISHABLE ON EITHER (a) THEIR FACTS OR (b) THE LAW.

Certainly, a well-established ground for granting certiorari is the existence of a conflict between the decision as to which review is sought and that rendered by the Supreme Court or some lower court whose judgment is final in the absence of Supreme Court review. However, this principle of review means that there must be a real conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized. See generally Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 392-393 (1923); Wisconsin Electric Co. v. Dunmore Co., 282 U.S. 813 (1930); Sanchez v. Borras, 283 U.S. 798 (1930).

Petitioners make passing reference to two decisions in their petition which they argue by implication conflict with the instant case: Pacific Legal Foundation v. State Energy Resources Conservation and

Development Commission, 659 F.2d 903 (9th Cir. 1981); and Greater Westchester Homeowners Association v. City of Los Angeles, 160 Cal. Rptr. 733, 26 Cal.3d 86, 603 P.2d 1329 (1979), cert. den. 449 U.S. 820 (1980). Obviously, these decisions are not in direct conflict with the Appellate Division's decision below. Petitioners' citation to Pacific Legal Foundation, supra, for the proposition that the Ninth Circuit "adopted a . . . narrow view of the scope of the federal preemption doctrine in the area of nuclear energy" (Petitioners' Brief at 20, n.6) is inaccurate. First, it should be noted that the Pacific Legal Foundation court noted with approval the proposition that "the federal government regulates how nuclear power plants will be constructed and maintained; the state... regulates whether they will be constructed". Id. at 923 (original emphasis). Next the court linked the federal government regulation of how nuclear power plants will be constructed and maintained to regulation of "radiological

hazards". Thus, the Ninth Circuit holding is fully supportive of the lower court's decisions in the case at bar, as well as the New Jersey Supreme Court's reasoning in State v. J.C.P. & L., supra, regarding pre-emption of state laws that would interfere with the federal government's determination that radiological hazards should be handled by a "piggyback" radwaste-liquid dilution cooling system. Finally, the Ninth Circuit case merely adds judicial gloss to an extant determination by the United States Supreme Court in Northern States Power Co., supra.

Use of the Greater Westchester case by the petitioners is merely an attempt to construct a conflict in the application of general principles of pre-emption with the case at bar. Greater Westchester was decided on the basis that the City of Los Angeles, as operator of the airport, was the one which chose the location and direction of the airport runways, approved their usage by jet aircraft, ignored

suggestions regarding the economic feasibility of constructing gound barriers to deflect and diminish aircraft noise, and rejected suggestions for the soundproofing of adjacent structures and restrictions on noise generated by static engine tests.

The Supreme Court of California found, therefore that:

> "Accordingly, City [of Los Angeles] cannot fairly argue that federal law has rendered City powerless to prevent or reduce the damages of which plaintiffs complain." (603 P.2d at 1333)

Here, however, as stated by the appellate court:

> "To the contrary, the trial judge found that the alteration of water temperature is directly related to the cooling system which was authorized, approved and licensed by the AEC. The defendant is licensed to operated as it does; it cannot operate in any other manner. He found that the radioactive waste disposal system is an integral part of the cooling system. 152 N.J. Super. at 398. That factual finding has ample support in credible evidence present in the record

> as a whole and we will not disturb it." (Emphasis supplied) (Petitioners' Appendix at 12-13)

Petitioners contend that the decision below is in serious conflict with the intermediate appellate court decision in Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W.2d, 266 (1975), as well as a decision from the Tenth Circuit, Silkwood v. The Kerr-McGee Corporation, 667 F.2d 908 (10th Cir. 1981). But, these decisions are manifestly not in conflict.

(1) The Michigan Decision

In Marshall v. Consumers Power Co., supra, Michigan's intermediate Appellate Court concluded that potential hazards of fogging and icing created by the particular nuclear power plant's cooling pond were "non-radiological" and that, therefore, a common law nuisance action was not pre-empted by federal law. However, this situation is clearly distinguishable on the facts from the decision below. The trial court judge in the instant matter properly noted in his opinion that:

(A) There was no indication of an intimate link between a radwaste system and the cooling pond in Marshall--i.e. the cooling pond merely served to dissipate waste heat from water which had passed over the plant's conductors versus the situation in the case at bar where the radwaste system interwined with the once-through cooling system;

(B) The Marshall court was, therefore, not considering radiological hazards but was considering non-radiological hazards whereas the case at bar (buttressed by the previous State Supreme Court holding in State v. Jersey Central Power & Light Co., supra) required a finding that the radwaste system of the New Jersey nuclear facility was inextricably linked with the once-through-cooling system; and

(C) To the extent the Marshall decision was inconsistent with the New Jersey Supreme Court's decision in State v. Jersey Central Power & Light Co., the latter decision

was binding on the intermediate New Jersey Appellate Court. (Petitioners' Appendix at 42 to 45.

Another distinction between Marshall and the situation at bar is that the action in Marshall was made before the plant had been put in to operation (and before an NRC operating permit had been granted). The New Jersey case below is clearly distinguishable on the facts since it involved a nuclear power plant which had been fully operational for a period of nearly five years before the class action law suit was commenced, and was subject to an AEC operating license which, to protect against radiological hazards, required operation of the once-through cooling-radwaste system. State v. Jersey Central Power & Light Co., 69 N.J. 102, 105-106 (1976). (Petitioners' Appendix at 6 to 10).

Thus, petitioners' contentions to the contrary notwithstanding, Marshall is distinguishable on its facts from the instant case. Both cases applied general legal principles in a consistent fashion after initial findings of fact regarding whether or not the particular power plant technology involved in each case was "non-radiological" or "radiological". Moreover, Marshall can be read as a situation, unlike the case at bar, where federal operating specifications were breached, triggering a permissible tort action.

(2) The Tenth Circuit Decision

Contrary to the petitioners' argument in their brief (Petitioners' Brief at 19 to 20), the Silkwood decision is clearly consistent with the instant case and, further, conforms with the Northern States-Train-Jersey Central Power & Light Co. line of authority that requires exclusive federal control over radiological hazards and the discharge of nuclear materials. After under-

taking an analysis of the preemption issue, the Silkwood court stated:

> "We cannot read [Northern States] and Train other than requirments to hold invalid any state action that competes substantially with the AEC (NRC) in its regulation of radiation hazards associated with plants handling nuclear material." 667 F.2d 908 at 923.

This holding is squarely consistent with the legal analysis and holding of the case at bar.

To the extent that the Silkwood court found a limited loophole for application of state tort law, it did so regarding an entirely different legal matter than the legal issue at bar, which issue is the application of the Atomic Energy Act, 42 U.S.C. §2021(k). Indeed, the Silkwood court merely held that:

> "The Price-Anderson Act contemplates that state court law applied in at least some cases involving nuclear incidents . . . a claim for compensatory damages for off-site contamination caused by the escape of plutonium is one such situation". Id. at 922.

A "nuclear incident" was not involved in the proceedings below, and the Price Anderson Act was, likewise, not at issue.

Third, to the extent that Silkwood can be read as inconsistent with the Appellate Division in this matter, the cases are clearly factually distinguishable. Whereas the former involved a survivor's action brought on behalf of a plutonium worker at a plutonium processing plant for pain and suffering, punitive damages, and incidental property damages for off-site plutonium contamination, the latter case involves a claim for damages to wooden structures allegedly caused by the proliferation of shipworms which allegedly thrived on heated waters from the nuclear power plant's radwaste cooling discharge system. While the former involved off-site nuclear materials allegedly causing an off-site "nuclear incident", the latter involved on-site nuclear plant radwaste/reactor cooling technology that allegedly caused off-site property damage, not involving a "nuclear incident" under the Price Anderson Act. Accord-

ingly, there is no real conflict on the same matter of law or fact in the Silkwood case with the case at issue here.

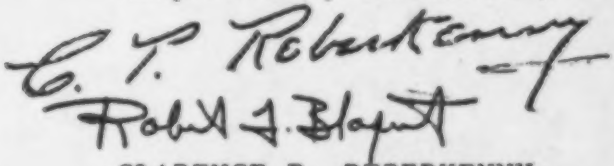
As a final matter, it should be pointed out that the crucial issue of proximate cause has already been determined in the case at bar in the context of an inverse condemnation action. (Pet. 22a-26a). The issue of proximate causation would cut across all of the existing state common law tort actions which petitioners seek to press against the respondent. In the event that this Court were to grant certiorari, reverse and remand, the element of proximate cause (which serves as a crucial element of a prima facie case on all existing common law tort actions) would be conclusively determined against the petitioners. The trial court's factual determination of proximate cause would be both the law of the case and collateral estoppel. See generally, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 328-329

(1970). Accordingly, granting certiorari in this case would be improvident.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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NO. 81-2065

In the
SUPREME COURT OF THE UNITED STATES

GERRIT J. VAN DISSEL, ET AL,
Petitioners

v.

JERSEY CENTRAL POWER & LIGHT
COMPANY, a corporation
of New Jersey
Respondent

Petition for a Writ of Certiorari
to the Superior Court of New Jersey,
Appellate Division

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N.J.S.A., Const., Art.1, ¶9 14

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Argument

I. THE DECISION BELOW AND THE RECORD IN THIS CASE CLEARLY RAISE THE IMPORTANT QUESTION PRESENTED IN THE PETITION

Jersey Central Power & Light Company (hereinafter "JCP&L") has argued that neither the Superior Court, Appellate Division, nor the Trial Court decided the question raised in the Petition for Writ of Certiorari and that the record at bar will not support a determination of that question by this Court. Respondent's Brief, pg. 3. JCP&L also contends that this Court should not grant the Petition because the Petitioners are seeking review and correction of factual findings of the Trial Court. Respondent's Brief, pg. 4, n. 1; pgs. 10-11. Petitioners submit

that these arguments are singularly lacking in merit.

The question of whether Petitioners' tort claims were preempted by federal law was raised by JCP&L's Motion To Dismiss For Lack Of Subject Matter Jurisdiction, A.30, A.65*, which in New Jersey, as elsewhere, presents a question of law to be determined on the basis of the allegations contained in the pleadings. (Because each side filed affidavits in connection with this question, the Motion to Dismiss was, in effect, treated as a Motion for Summary

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* All "A" references are to the Appendix To The Petition filed herein.

Judgment.)[1/] Moreover, an examination of the Affidavits filed, in particular those of Donald Ross, for JCP&L, A.67, and Michael Warren Golay for the Petitioners, A.82, shows that there was no material factual dispute between the parties as to the relationship between the cooling system and the radwaste discharge system and that the facts

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1/ The record on the Motion To Dismiss contained the Complaint, the Answer, the three Affidavits set forth in the Appendix and the live testimony of Dr. Elaine Hoagland, a marine biologist who linked JCP&L to the shipworm epidemic in the Oyster Creek-Forked River area and provided what Judge Stein found to be a prima facie case of liability. A.39, n.2. The nine-day trial referred to in Respondent's Brief, pg. 4, n.1, concerned the inverse condemnation trial before Judge Kaplan and had absolutely nothing to do with Judge Stein's action on the Motion To Dismiss.

found by Judge Stein, A.26, were not a matter of dispute and could have been subscribed to by either of the affiants.[2/] Clearly, with respect to the preemption question, the Trial Court did not weigh

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2/ It should be noted that neither Judge Stein nor the experts who gave affidvits on the issues relating to the preemption question used the terms "cooling radwaste" system or "radwaste-cooling" system which JCP&L's counsel have apparently coined. Each expert recognized that there were two separate systems, one of which, the radwaste discharge system, utilized a portion of the other, the condenser cooling system. JCP&L's use of this misleading concept of a combined system obfuscates the issues in this case. See, e.g., Respondent's Brief, pg. 9.

the "credibility"[3/] of the experts but rather made a ruling of law based upon facts which were virtually stipulated.

That the Trial Court did decide the issue raised in the instant Petition is shown by the Court's own characterization of the issue which it stated it was deciding. The Trial Court characterized the question before it as whether "the doctrine of federal preemption bar(s) a private plaintiff from pressing tort claims for damages to his property allegedly arising from the governmentally-approved operation of defendant's nuclear power plant?", A.28, and, in response

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3/ Certainly, there was no suggestion in the Superior Court Opinion that Judge Stein found one affiant more credible than the other.

to that question, concluded that,

> Plaintiff's attempts to seek money damages through the vehicle of tort claims constitute at least an indirect interference with the defendant's radwaste discharge system. Such state interference is impermissible. This court lacks subject matter jurisdiction over all of plaintiff's claims based upon tort liability and statutory violations. A.48-49.

In turn, the Superior Court, Appellate Division, affirmed, stating, that the Trial Court's conclusion "that plaintiffs' assertion of tort and statutory claims for damages constitute at least an indirect interference with defendant's radioactive waste discharge system is affirmed, substantially for the reasons expressed by him." A.13.

The subsidiary legal issues which are raised by the decisions below and which will be addressed if this Court grants the Petition include: (1) whether, on the facts found by the Trial Court, any legally cognizable "interference", direct or indirect, with preempted activity, i.e., elimination of radwastes, existed, cf. State v. Jersey Central Power & Light Co. 69 N.J. 102, 115, 351 A.2d 337, 344 (1978); and (2) whether the "indirect interference" with pre-empted activity shown by the record is sufficiently substantial to mandate a conclusion that the Petitioners' tort claims for shipworm damage due to thermal pollution must be barred. The Petitioners do not intend to argue that this Court should review and

correct the virtually conceded fact-findings of the Trial Court.

The May 4, 1982 decision of the Court of Appeals for the Seventh Circuit in Illinois v. Kerr-McGee Chemical Corporation, 677 F.2d 571 (7th Cir. 1982), is another example of a Court of Appeals deciding the legal issues inherent in the present case contrary to the Superior Court of New Jersey, Appellate Division. In that case, the Court of Appeals reversed the District Court's dismissal of a civil action charging the defendant with maintenance of a public nuisance, unlawful condemnation of public property, and violation of state and city regulations in connection with its operation of a waste disposal facility containing both radioactive and non-radioactive materials and held that

the regulation of non-radioactive hazards by the states or their political subdivisions was not preempted by the Atomic Energy Act. Id., at 581. Moreover, in determining that the City of West Chicago's civil claims were actionable, the Court expressly rejected the defendant's argument that the City's action should be barred on the grounds that it would indirectly interfere with the preempted area of radiological hazards because the waste disposal facility contained both radioactive and non-radioactive materials in close proximity to each other. Id., at 582.[4/]

Similarly, it will be argued

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4. The Court indicated that the issue before the trial court would be whether an "actual conflict exists between the [Nuclear Regulatory] Commission's authority and the city's suit." Id., at 582.

herein that this Court should reject the Trial Court's erroneous legal conclusion that the Petitioners' tort claims are barred on the ground that they would indirectly interfere with the preempted area of radwaste discharge. In addition, the Petitioners will argue that the prosecution of tort claims against JCP&L for damages resulting from the nonradiological impacts of its operation will have no legally cognizable effect, direct or indirect, on the preempted activities of the plant and that no actual conflict exists between the authority of the Nuclear Regulatory Commission over radwaste discharge and the prosecution of their tort claims. The Petitioners have absolutely no intention of arguing that the fact-findings of the Trial

Court on the preemption issue are erroneous and should be reversed.

Petitioners submit that a fair reading of the record indicates that issues of great import are implicated in the decisions below and that the case of Van Dissel, et al vs. Jersey Central Power & Light Company is "certworthy".[5/]

5/ Since the date on which the Petition was filed, this Court has granted certiorari in the case of Pacific Legal Foundation v. State Energy Resources Conservation and Development Commission, 659 F.2d 903 (9th Cir. 1981), cert. granted sub nom., Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission, 50 U.S.L.W. 3998.01 (U.S. June 21, 1982) (No. 81-1945), a case involving the scope of federal preemption under the Atomic Energy Act. Moreover, the Plaintiff in Silkwood v. The Kerr-McGee Corporation, 677 F.2d 908 (10th Cir. 1981), petition for cert. filed, 50 U.S.L.W. 3949 (U.S. May 20, 1982) (No. 81-2159), another case which raises similar issues, has filed a Petition for Certiorari.

II. THE PETITIONERS WILL NOT BE COLLATERALLY ESTOPPED FROM PURSUING THEIR STATE LAW TORT CLAIMS, AND THE GRANTING OF THIS PETITION FOR CERTIORARI WILL NOT BE IMPROVIDENT

At the end of its final argument, JCP&L contends that the Petitioners will be collaterally estopped from pursuing their state law tort claims on remand following a favorable decision from this Court due to the Trial Court's finding on the issue of proximate cause and that, therefore, this Court should not grant the instant Petition. Respondent's Brief, pgs. 25-26. However, the Respondent's view is mistaken as to both the scope of review of this Court and the state of the law on collateral estoppel in New Jersey.

First, any question of the application of the doctrine of collateral estoppel in the trial of this case in the New Jersey state courts is purely a question of state law, clearly beyond the scope of this Court's review, and not material to this Court's decision of this Petition. Additionally, under the law of collateral estoppel, issues are never automatically precluded from consideration by the trier of fact and the doctrine is often not applied for a number of reasons generally relating to its unfairness to litigants. See e.g., Gareeb v. Weinstein, 161 N.J. Super. 1, 15-16, 390 A.2d 706, 712-15 (1978). In this regard, the application of the doctrine of collateral estoppel to the trial of the Petitioners' tort claims would serve to deprive the

Petitioners of their right to a trial by jury under the New Jersey Constitution, N.J.S.A. Const. Art. 1, ¶9.

The Petitioners demanded a jury trial on all of their claims; their common law tort claims were dismissed on preemption grounds; and their demand for a jury trial on their remaining inverse condemnation claim was denied. Thus, to apply collateral estoppel based on the Trial Court's proximate cause finding in the non-jury trial of the inverse condemnation claim so as to defeat the Petitioners' common law tort claims would deny the Petitioners their fundamental right under the New Jersey Constitution to present those claims to a jury. Indeed, in interpreting the same Article of the New

Jersey Constitution which affords the Petitioners a right to a jury trial on their tort claims, the New Jersey Supreme Court has recently held that the use of collateral estoppel in a criminal case denies the defendant his constitutional right to a jury trial. State v. Ingenito, 87 N.J. 204, 432 A.2d 912, 915-19 (1981). It is submitted that the Petitioners can readily present persuasive arguments, especially on state constitutional grounds, against the application of collateral estoppel to its common law tort claims in the New Jersey courts. Therefore, this Court should not be dissuaded from granting the instant Petition over the important federal question presented by the possibility that a New

Jersey court might ultimately apply collateral estoppel to bar the Petitioners' tort claims.[6/]

CONCLUSION

For the reasons stated herein, this Court should grant the Petition for Writ of Certiorari and review the important question of Congress' intent vel non to preclude the assertion of state tort claims by persons whose

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6/ It should also be noted that the issue of proximate cause is not an essential element of all of Petitioners' tort claims. See, e.g., 2 J.A. Dooley, Modern Tort Law §40.01, at 155 (1977) (trespass).

property is damaged by the non-radiological hazards of the nuclear energy industry.

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